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2547
No. 12023

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,
vs.
HONOLULU PLANTATION COMPANY,
Appellee.
and
HONOLULU PLANTATION COMPANY,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

(In Four Volumes)
VOLUME III
(Pages 841 to 1248)

FILED

DEC 30 1948

PAUL P. O'BRIEN,

CLERK

Appeal from the United States District Court
for the District of Hawaii

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(Testimony of C. C. Crozier.)

Q. In connection with this land tenure you stated that some plantations were largely fee, some largely leasehold, some mixed. Is there any particular reason for that?

A. Well, from my experience and reading and listening, fortunately as I have been in this work I have had the opportunity of talking to the old plantation managers—in the old days, the horse and buggy days, so to speak, in the plantations prior to annexation there was a question of land tenure, and naturally prior to the division of the land—we'll go back to 1850—the land was all owned by the king. And we find sugar coming into its own as a commercial enterprise of the Territory in about 1860. In those days it was—most of the plantations were started on a shoe string. Land was cheap. Rents were next to nothing. Then, later on, when mainland capital came into the sugar business by reason of their experience, as I see it, and knowing that the sugar business was a sound business for the Territory, those mainlanders felt that in order to put that much capital in a sugar enterprise that from their back [1531] experience was to own the fee. Then with annexation, when we wrapped ourselves within the folds of the American Flag and assured ourselves of posterity and security, we find a lot of these people that acquired these lands would not sell them and would lease them. Naturally, a lot of the individuals were in the sugar business and upon their death we find family holding corporations and trust estates being

(Testimony of C. C. Crozier.)

created. So that from about 1900, from annexation on down, it has been almost impossible to buy any fee land in the sugar enterprise. That is partly due maybe to the type of ownership and second, as in 1910 and up to the First World War, the rents were reasonable. And possibly in a business economy standpoint it was cheaper to rent than to purchase. Of course, some of the rents were low under these long term leases of 1880 and 1875, for 50 and 60 years.

Q. Then, as I understand it, it was the policy of these larger owners, estates and owners, not to sell but to lease? A. That is correct.

Q. You recently made a detailed study of the land holdings, have you not?

A. Yes, Mr. Vitousek. I was requested by Mr. Courtney, when the House Investigating Committee was here, to take from our records certain statistics relative to the acreage on the different islands in cane.

Q. Held by estates? [1532]

A. Not necessarily. The study was for different years, the Territory as a whole, the fee land owned by the sugar companies, and the respective percentage, and the lease acreage and its respective percentage.

Q. Well, I refer particularly to a study regarding the land holdings by estates.

A. Oh, yes.

Q. Did you make such a study?

A. Yes.

(Testimony of C. C. Crozier.)

Q. That was made for the Legislature of the Government?

A. That was made for the Legislature.

Q. Have you got a copy of it with you? (Witness hands a document to Mr. Vitousek.) I show you what is headed here "Real Property Inventory Schedule, January 1, 1945, City and County of Honolulu." What does that refer to?

A. Well, this is a schedule that was made up at the request of the Attorney General relative to the list of property owners, by the individuals, corporations and estates that have 500 acres or more of land on the Island of Oahu. The schedule shows the largest land owners as the Bishop Estate was 57,000 acres—

Mr. Rathbun: Just a minute, before you testify. I object to him testifying to anything about it. When the time comes—

By Mr. Vitousek:

Q. Before you give the figures, Mr. Crozier, I want to [1533] ask more of the general questions as to what it shows rather than the details.

A. Well, it shows that of the property owners on Oahu, Oahu having an acreage of 386,000 odd acres—

Mr. Rathbun: Well, he's reading again from it. I object to it. If he's going to ask him about it, offer it or something, if he's going to read from it. Then we can make an objection.

Mr. Vitousek: If the Court please, I'm going to offer it in evidence as soon as the witness shows in general what it is.

(Testimony of C. C. Crozier.)

Mr. Rathbun: Well, it speaks for itself what it is.

The Court: He is entitled to describe what it is.

Mr. Rathbun: Well, I object to it as incompetent, irrelevant and immaterial in this case; no purpose shown of any kind bringing such thing as this under the issues, all the land holdings of the island.

Mr. Vitousek: Well, if the Court please—

The Court: This relates to the Island of Oahu?

The Witness: It does.

The Court: The document will speak for itself if it comes into evidence, but the witness may describe what it is, to lay a foundation for offering it. By Mr. Vitousek:

Q. Without giving detailed figures, Mr. Crozier, just [1534] in general language what does this document show?

A. Well, this document is an inventory schedule showing 28 property owners, their respective names, their respective acreages, their value. and the percentage; and further classified into the different types of land such as commission, apartment, residential, agricultural, or miscellaneous, of their respective areas.

Q. And relates to the Island of Oahu?

A. City and County of Honolulu.

Q. City and County of Honolulu?

Mr. Vitousek: Now, if the Court please, we offer this document in evidence.

The Court: What is the purpose?

(Testimony of C. C. Crozier.)

Mr. Rathbun: I object to it as incompetent, irrelevant and immaterial. It has nothing to do with the issues here as far as any purpose stated is shown.

Mr. Vitousek: If the Court please, it has several purposes. One is stated in our opening statement. There is to be proven what is termed as a leasehold plantation, that it is common practice in this Territory, well-recognized business practice, due to the fact that the lands are held by large estates to lease; that the lessees reasonably expect continuation of the lease at whatever rents are prevailing at the time; that the only way these sugar plantations, known as leasehold plantations, can secure land is by way of lease. It bears out [1535] the evidence previously brought before the Court that no other lands are available for this plantation, and it will be part of the foundation of further testimony that this witness will be asked to give in connection with the investments required, and which will then be tied up in his opinion of the value as between a leasehold and a fee simple plantation, this being a leasehold plantation.

The Court: Let me have that last point again. It will be used by the witness—

Mr. Vitousek: It will tie up to the witness' further studies we are going to introduce or propose to introduce, showing the investments as between a leasehold and a fee simple plantation, which in turn will be followed by this witness' testimony regarding, giving a basis for opinion of damage in this particular case.

(Testimony of C. C. Crozier.)

The Court: Well, as to the issue of it being the practice to lease lands to operate plantations, and as to the issue of whether or not they are available for purchase on a fee basis, I hadn't been of an opinion that there was too much of a dispute on that, and I can't definitely see where this document would particularly affect that issue. But if this is to be used as a basis for some testimony that this witness is going to give which will be material on the condition that it will be tied up, related thereto, I will admit it conditionally. Have you anything you want to say? [1536]

Mr. Rathbun: Well, I haven't heard anything in this statement that makes it in any way permissible in this case. The practice of holding land by lease—what's the difference about a practice? They had leases here and this case stands on the exact leases that are in evidence. Their practice has nothing to do with it. The rights are under these leases and in evidence. This sheds no light on that. Further, that "we may reasonably expect renewal." I can't possibly imagine how that shows anything about an expectation of renewal. Just showing that certain people own certain land: no land available. Well, there's all those lands. We know whether they are available or not. That shows nothing on its face to show that. And the only way they can get land is by lease. Nothing about this that shows that. Cluttering up this record with a wide range of things that have nothing to do with the case.

The Court: Well, that is my general reaction

(Testimony of C. C. Crozier.)

to it also. Incidentally, this has become a public document, hasn't it?

The Witness: It has.

The Court: And is one which the Court could take judicial notice of if need be.

Mr. Rathbun: I don't know what it is.

The Court: I am going to admit it conditionally as related to this witness' testimony, and unless it is somehow or other tied in with testimony he later gives, it may be moved to strike it, if one wishes to strike it. So that it [1537] may become—

The Clerk: Honolulu Plantation Exhibit No. 14.

The Court: No. 14 admitted conditionally.

(The document referred to was received in evidence as Honolulu Plantation Company's Exhibit No. 14)

[Printer's Note: Exhibit No. 14 is set out in full at page 1538 of this printed Record.]

By Mr. Vitousek:

Q. You stated, Mr. Crozier, that you had made a study of the plantations as between the character, their holdings, fee and leasehold, and made some schedules from that basis. Have you got them with you? (Witness hands some documents to Mr. Vitousek.) I hand you, Mr. Crozier, and hand counsel a copy, of what is headed "Sugar Cane Acreage, Territory of Hawaii, January 1, 1935." And without giving the details, would you describe in general what that shows?

A. This is a schedule, as prepared by me, showing sugar cane acreage, Territory and Oahu, taken

(Testimony of C. C. Crozier.)

from the tax records as to the total area in cane, in fee throughout the Territory, and the percentage, the total area in cane throughout the Territory of all their leased areas and its percentage; then for the County of Oahu, City and County of Honolulu, the total acres in cane, its percentage, and the total area in cane under lease and its percentage. Likewise, for the year January 1, 1939; likewise, for the year January 1, 1944.

Mr. Vitousek: We offer this in evidence.

Mr. Rathbun: I object to that for the same reason that [1538] I objected to Exhibit 14.

The Court: It's all very interesting, Mr. Vitousek, but what is its purpose? I don't feel it is getting us anywhere with regard to the issues of this case.

Mr. Vitousek: Well, if the Court please, in this case—I will state again—referring to the opening statement, it is our contention that in viewing this case we must take into consideration the business practices in this Territory; that in making the investment the Honolulu Plantation made, as has been testified to—and the improvements—it had, as an owner, the right to expect those business practices to continue; that these exhibits show that it's been the practice in this Territory to conduct plantations, and particularly shows that on the Island of Oahu conducted plantations, by leasing land. This witness will later show in his study of these plantations the difference in investments between leased land and fee simple land, and later,

(Testimony of C. C. Crozier.)

as I stated, will give his view as to damage suffered in this particular case. But certainly we are entitled to show what an owner would expect and what a prospective purchaser would expect. That would be shown by what had occurred in the past, that the land in this Territory is closely held, it becomes necessary to lease it, that it has been the practice of those landlords to continue those leases. And consequently anyone who would be a prospective purchaser for the property making up the Honolulu Plantation, before and after the takings involved in this suit, would [1539] undoubtedly make just such a study as shown here to find out whether they could reasonably be assured that they could continue holding those lands under lease. Because they would undoubtedly be required, as this particular owner was required, to make investment in the nature of improvements, ditches, transportation system, improvements to mill, and so on, which would not be made unless it was reasonably expected that they could anticipate continuing as had been done in the past. And this all builds up that history.

Mr. Rathbun: There isn't one thing that illustrates what he said.

The Court: I don't think so either. Assuming that all you said was true, I don't see where this set of figures advances that proposition that you argue for.

Mr. Vitousek: If the Court please, the witness has not finished his testimony yet.

(Testimony of C. C. Crozier.)

The Court: Well, I'll do the same thing with this that I did with the other; I'll admit it conditionally, subject to a motion to strike.

The Clerk: Honolulu Plantation Company Exhibit No. 15.

(The document referred to was received in evidence as Honolulu Plantation Company's Exhibit No. 15.)

[Printer's Note: Exhibit No. 15 is set out in full at page 1539, of this printed Record.]

By Mr. Vitousek:

Q. I show you, and I have handed to counsel a copy of it, what is headed "Honolulu Plantation Company, Sugar Cane [1540] Acreage." What in general does that show?

A. This is a similar schedule except that it pertains to the Honolulu Plantation specifically. It shows that on January 1, 1935, the acreage owned in fee in sugar cane land and the acreage under lease—what is the total and their respective percentages. Likewise, for the year January 1, 1939, and again January 1, 1944. And at the bottom there is a note showing that a decrease in sugar acres between '39 and '44 of so many acres at a certain percentage—

Mr. Vitousek: We offer this particular document in evidence, if the Court please.

Mr. Rathbun: I object to that for the same reason, particularly in regard to the information on it from January 1, 1935, to January 1, 1939, and from 1939 up to the time of the first, starting of

(Testimony of C. C. Crozier.)

the first law suit involved in this case. They have nothing to do with the issues here.

Mr. Vitousek: If the Court please, what they have to do with the issues here is the very same thing that's been brought out by the witness previously. It's quite true that in this particular case we have stated to the Court that we are asking only for damages due to the takings involved in this suit. But the history of this plantation, showing the amount of fee and the amount of leasehold over the period of time involved is a matter that should be taken into consideration. It shows the relative proportions which bear out the statements made by [1541] previous witnesses that this is a leasehold plantation, and in addition to that there were questions asked of Mr. Schmutz while on the stand concerning these previous takings.

Mr. Rathbun: They are not claiming any damage in the remainder, as to the lands that were taken from 1935 up to the first taking in the cases involved here. I cannot see where this has any materiality and object to it on that ground.

The Court: What is the date of the first case here?

Mr. Rathbun: I can't tell you offhand. It's after '39.

The Court: After '39?

Mr. Vitousek: June 21, 1944, if the Court please, was the first case filed in the present proceedings.

The Court: So this figure here represents the prior cases that are not here involved?

(Testimony of C. C. Crozier.)

Mr. Vitousek: Yes, if the Court please. This plantation started out as a mill and other property as a 35-ton mill and plantation. And so we in this case have been endeavoring to trace its history and bring it down to the size it was before these takings so that we can confine the witness' testimony to the amount we are going to claim as damages due to the takings involved in this suit?

The Court: I think this document is admissible. I will overrule the objection and you may have an exception.

The Clerk: Honolulu Plantation Exhibit No. 16.

(The document referred to was received in evidence as Honolulu Plantation Company's Exhibit No. 16.) [1542]

[Printer's Note: Exhibit No. 16 is set out in full at page 1540, of this printed Record.]

By Mr. Vitousek:

Q. Mr. Crozier, in regard to the Honolulu Plantation Company itself, have you made a study of that plantation, its properties?

A. Yes, insofar as my capacity as a taxing official, and further, being an appraiser for the Government in a number of its takings, I have gone into the Honolulu Plantation to a considerable extent.

Q. In connection with that particular matter, I perhaps overlooked it, have you acted as an appraiser in appearing before the Court in any proceedings?

A. I have.

(Testimony of C. C. Crozier.)

Q. Would you give the names of some of them?

A. Well, I have been in the Territorial Courts in considerable—numerous times. I have also been in the Federal Court. The outstanding case that was tried in the Federal Court, I believe, was what is known as Civil 436, which took Damon Estate land outside the Navy Yard gate, what is known as a gore lot between Kam highway and Dillingham Boulevard. And then the area on the lower side of Dillingham Boulevard, entrance to Hickam Field and towards John Rodgers Airport. I was a Government witness in testifying as to the value of that land and the improvements thereon.

Q. Now, following up this question I asked you, you have placed plantations, described them in two categories, one [1543] whether leasehold or not and the other whether irrigated or not. What category would you put the Honolulu Plantation in?

A. The Honolulu Plantation refers principally to a leasehold plantation and as to its field operations it would be an irrigated plantation.

Q. In assessing this property for tax purposes, how did you get your information?

A. Well, under the law, in the provisions relative to valuing the land, there are certain items set forth in the section pertaining to the determination of cane rates. The owners report to us that certain of their lands are under lease to the different sugar and pineapple companies or other uses. We then turn to the lessee or the occupant for a classification of that land. We find the land

(Testimony of C. C. Crozier.)

in three categories, lands that are strictly used by the plantation in the production of sugar, sugar acreage; the second class is those areas under lease that we term attributable to the sugar enterprise. It might start with a mill, manager's house, reservoirs, railroads, ditches, roads, those areas that are dedicated by the lessee as part of the sugar enterprise. Then under these leases there are other types of land which we call "other uses", that the lessee might sublease if his lease provides for it, or he might use it in other activities other than sugar enterprise. Lots of times we find on Waialua, on this island only land and leasing land of which they sublease [1544] to a big area, to Hawaiian Pineapple Company.

Q. Now, in connection strictly with the Honolulu Plantation, was that procedure followed, the owners of the land made returns showing—

A. That's right, the owner's report—the eight or ten owners report that leases of the Honolulu Plantation state that blank acreage is leased to Honolulu Plantation; Honolulu Plantation then submits a return which shows the classification.

Q. Well, in the Honolulu Plantation return it did show whether it was leased or not also?

A. Yes.

Q. And whether they held it under lease?

A. Yes. They submit three types of classification. They submit a schedule for their fee lands showing their lands in fee that are tied up to our so-called mapping system, bearing in mind our

(Testimony of C. C. Crozier.)

basis of accountability is by maps. And the maps produce a parcel owned, whether it's a corporation, plantation or not, for the identification of ownership. That has an area on it. And then that area in turn is broken down.

Q. Then, as I understand it, for assessing purposes you get a declaration both by the owner and by the lessee? A. That's correct.

Q. As to the ownership of the land and the areas and the use?

A. Yes, the owner comes in and sets up the parcels with their mapping system, by acquisition or deed or by arrangement [1545] for accountability, and they say they own that acreage and in turn break it down by the occupants or lessees. Then the lessees submit classification, bearing in mind that the law provides that any land leased, the terms of which they are to pay the taxes on, that the lessee has the right of appeal. So you have the three schedules coming in, the plantation fee land—or four schedules really—the plantation fee land, land that they own under co-tenancy, land that they lease from the Territory of Hawaii, and land that they have under lease from others.

Q. And it shows the others?

A. The lists there — it lists their names and identification, the grant and the L.C.A.'s and the key and the acreage and that acreage broken down to its classification or use.

Q. Did you get your information from any other sources?

(Testimony of C. C. Crozier.)

A. Well, lots of times we have had lots of fun with them; we disagree with their classification and rearrange the classifications by our own field surveys.

Q. As you make inspection on the grounds.

A. That's correct.

Q. Have you made an inspection of the Honolulu Plantation property on the grounds?

A. Yes, many times.

Q. Any other method of getting information?

A. No, I think by that time we have the classification [1546] submitted by the occupant and the field checks, why we have pretty well covered the area in question.

Q. Well, do you ever have occasion to use the annual reports?

A. Well, they come in, that part comes in to the part of setting rates against these various areas.

Q. Then you do see those reports?

A. That's correct. A rather comprehensive study is made to determine the over-all rates of a plantation, of its cane fields, the attributable areas, if a reservoir or railroad is within a cane field. We have adopted the rate applicable to the adjacent cane, baseball park, or manager's house in the middle of a cane field, and so forth. The other use areas not used as part of the enterprise take their respective rate by conditions as found on the property. And we find them all the way from waste land to bank sites.

Q. In connection with the plantation itself, you

(Testimony of C. C. Crozier.)

speak about attributable areas. How about roads in fields?

A. Roads are classified as attributable area, set up.

Q. Well, why do you call it attributable areas?

A. Well, those are the areas that are used as part of the enterprise.

Q. Are they necessary for the enterprise?

A. They are necessary in the production of its sugar activity. [1547]

Q. What improvements, if any, are used as part of the enterprise?

A. Well, they are rather voluminous. You take a plantation and you go through the different types of improvements—

Q. Well, I mean—let's take the Honolulu Plantation Company.

A. The structural improvements on Honolulu Plantation, that's the mill, the manager's house, and the camps, pump houses and the like, are accounted for as real property. Their tax value is determined by replacement less depreciation due to age and condition. The other items, such as reservoirs, are real property. The improvements—there are reservoirs of different types; some are concrete lined and some have penstocks and the like and gates, and the valves and the like, are chattels of the corporation. The land itself is real. We have the ditches, different types of ditches. They are what we call the lined ditches and the open ditches. They are just the earth ditches or the

(Testimony of C. C. Crozier.)

lined ditches, have specific physical construction, concrete or boxes or the like. Some of the ditches are portable, some are permanent. The portable become permanent—the lined ditches are merged, the permanent ones are merged with the so-called area classification.

Q. How about railroads?

A. Railroad beds are real property and the ties and the bed itself are permanent property. [1548]

Q. Were there railroads and railroad beds on the Honolulu Plantation?

A. There are in certain sections.

Q. Used as part of the enterprise?

A. That's correct.

Q. How about a hospital?

A. The Hospital is part of Honolulu Plantation's enterprise and considered attributable, part of the enterprise activity.

Q. In connection with the mill, is there a generating plant? A. There is.

Q. Is that part of the enterprise?

A. That is.

Q. Well, in addition to that you described, how about the machinery and such, was there machinery located there?

A. Yes, different types, mill machinery, pump machinery, field machinery, all types of machinery in a sugar enterprise, all part of the chattels of the lessee.

Mr. Vitousek: If the Court please, may we take the usual recess?

(Testimony of C. C. Crozier.)

The Court: Yes, we can maintain our schedule by taking our recess at this time.

(A short recess was taken at 10:03 a.m.)

After Recess

[1549]

The Court: Proceed:

By Mr. Vitousek:

Q. Mr. Crozier, in connection with the mill machinery—by that I mean the engines, crushers, cane washers, all machinery in connection with the crushing of cane and making it into sugar—would you give in general the character of that machinery?

A. Well, recently there has come into the picture as you enter a sugar mill the washers, the conveyors taking care of the cane by reason of mechanical harvesting equipment, and that's brought into the mill and put into these conveyers. The cane then goes up and is chopped up and enters the rollers, the main part of the mill. And then it goes down and gets into the—the juices are run off and they get into the liming machines to take out the heavy ingredient of dirt and the like. And they go to the vacuums, and in the vacuums they are cooked and it goes through the long coolers which whip the molasses on down to the centrifugals where your brown sugar is separated from your liquid form, the brown sugar into bags in the warehouse.

Q. Well, is this machinery heavy or light?

(Testimony of C. C. Crozier.)

A. Most of it is exceedingly heavy machinery.

Q. And on stone foundation?

A. Most of it is on heavy reinforced heavy concrete blocks. [1550]

Q. Now, you spoke a while ago in your testimony in regard to your assessing work. I believe you called it chattels.

A. Yes.

Q. Why?

A. Personal property. By definition of the law it says that certain items—and we could come down to a plantation—that certain items for tax purposes would be treated as personal property, machinery and equipment and the like.

Q. Does that go for the pumps?

A. It does.

Q. Used in irrigation systems?

A. It does.

Q. How about road bridges and railroad bridges?

A. Railroad bridges, the bridge itself, the structural part, the wooden part of the bridge, the structural part is real property; the ties and rails and block systems, switches, are part of the machinery and equipment of the lessee or the corporation.

Q. And that is, you say, according to the provisions of the law?

A. The provisions of the law.

Q. Now, in making these valuations for assessing purposes, what did you take into consideration?

A. Well, the law applies—

Mr. Rathbun: May we object to that, what he takes in for [1551] assessing purposes? It has noth-

(Testimony of C. C. Crozier.)

ing to do with this case, making valuations for assessing purposes.

The Court: The objection is good.

Mr. Vitousek: Well, if the Court please, that is something that has to do with this case in that it shows his knowledge of the plantation and knowledge of the various factors, and later on when he gives his view, if he does, for the purpose of this case it would show his familiarity with this property. It's all confined to the Honolulu Plantation Company.

The Court: Well, I think you can bring that out without getting into assessing for tax purposes. What you want to get at is his knowledge of this plantation, I repeat, without getting into the assessing features. The objection is good.

Q. In connection with your work, have you made any study of the investments required in a plantation property?

A. In order to get at the unit rates for our purposes, a plantation has to be studied, and under the provisions of the law it gives us the opportunity to review the plantation from so-called three angles, as I have heretofore stated. One is the sales of land, which is so-called market value. We can capitalize the rents of the different leases, or make a study of the different leases and screen them to find if the rents per acre can be established. And in the absence of either sales or rents, we can go to what is known as the productivity method, as I stated heretofore, that you take [1552] the sugar

(Testimony of C. C. Crozier.)

and sell it, the gross realization from the land, deduct the operating expenses, and we arrive at a net profit. We take the net profit and allocate it to operator and landlord and we take the landlord's share and capitalize it to reflect his earning power, or his share of the use of that land. All these studies have been made of the principal plantations. Bear in mind, many plantations are what is known as marginal or lame duck plantations. Where there is no earning, there is nothing to capitalize. So that we have to go to the other tests of market value, either sales or rents, or the opinion of people.

Q. Well, have you made a study of the investments required to operate a plantation, capital required? A. Yes, we have.

Q. Does it vary or not between leasehold and fee simple? A. It does.

Q. Which is the greatest?

A. The plantation upon the ground — the fee land.

Q. Now, have you related such a study to the Honolulu Plantation? A. Yes, I have.

Q. Mr. Crozier, assuming on January 21, 1944, the Honolulu Plantation Company had approximately 4,400 acres of cane land, both fee and leasehold—to be exact, 4,397.34 in use—and that on that date 1,087.59 acres of cane land were taken [1553] away from it, what in your opinion was the fair value of all the properties of said plantation before the taking and the fair value of all the properties of said plantation remaining after the taking,

(Testimony of C. C. Crozier.)

excluding moveable personal property and growing crops, taking into consideration your knowledge of the plantation, its holdings, the manner in which held that you referred to in your previous testimony?

The Court: May I have that question?

(The reporter read the last question.)

Mr. Rathbun: I object to that, if your Honor please. In the first place, he hasn't shown qualifications to go into any subject as that. He never valued a plantation other than the Honolulu as far as the record shows; used January 1, 1944, as their date when, as a matter of fact, the takings involved in this case are not on January 1 but at varying dates.

Mr. Vitousek: June 21st.

The Court: You said January.

Mr. Vitousek: If I did, I'll—

The Court: Do you want to change it?

Mr. Vitousek: If the Court please, I was reading from a question which said June 21st. If I said January, I was misreading it. It should be June 21st.

Mr. Rathbun: Well, I make the same objection as to June 21st. There is no series of 13 cases that began on June 21st, 1944, that the record shows; it shows that they were all of [1554] different dates. Therefore, a taking of one set of acreage on one date would create one situation and later taking any piece would create another situation.

The Court: On that particular point, how about

(Testimony of C. C. Crozier.)

this motion of the granting of the order to consolidate the cases?

Mr. Rathbun: Well, the consolidation doesn't change the date, but the taking. That was to consolidate them for trial.

The Court: I'm not too sure.

Mr. Rathbun: Further than that, he hasn't shown that he is familiar with the conditions in many respects. One of them is the terms of the leases in these cases, all of which enter into this question.

Mr. Vitousek: Now, if the Court please, it is shown that he is familiar with it from the returns made by the two parties. Also from the examination of these reports which give all that information. And if he is not familiar sufficiently in their opinion, that's a matter for cross-examination to show the weight of this testimony. Insofar as that issue is concerned, he has also shown his long period of study of plantations, of their operation, of value, both under the old enterprise-for-profit method which required a valuation as a whole, and under the new statutes. It is shown that he has been called as an expert in testifying in court in regard to these properties making up the plantations, not the plantation as a whole but property making up the plantation. He has shown his familiarity with that. And as to the date of taking, if [1555] the Court please, he has been asked that date because of the order of this Court made on motion, and without opposition said the cases shall

(Testimony of C. C. Crozier.)

be tried as if all the takings were involved in one proceeding. Under that we believe the first date is the date to be taken. If it matters, any other date during that period of time, to be confined at least to the date these suits were filed. Now, if there is to be any other date contended for, that there were takings under the so-called Military Governor's orders, even that is something to come up in the Government's case, not ours. We are assuming only that the cases here as filed fixed the date and certainly that is a material factor. The first taking in these series of cases was June 21st. There is one that ran, I believe, to December. But all the major takings—the other only involved a very small area as shown in the exhibits—occurred over approximately a 6-month period, June 21st to January 18th, I believe, of 1945. So they were filed almost uniformly in one month apart. But under the order, the order consolidates them and treats them as if there was one proceeding. And we believe that the first date of taking, therefore, becomes, or the first suit filed becomes the important date.

The Court: Is there anything so far to show that this witness has any specific knowledge of the terms of the individual leases under which this plantation operates?

Mr. Vitousek: If the Court please, he has testified that [1556] in the returns, both the owner and the lessee submit their classifications to leasehold or not; as to the length of the term of the lease, it shows in the exhibits.

(Testimony of C. C. Crozier.)

The Court: Yes, but the specific terms and conditions of the individual leases is quite a different matter. He can acquire and utilize the knowledge to what you refer to without knowing the terms of the leases. I don't think there is anything that shows that he knows the contents of these various leases. That may, however, go to the weight. I don't know.

Mr. Vitousek: I could ask that question. It's the length of the terms that counts, and that's shown in the exhibits.

Mr. Rathbun: It's the length of the term that counts with us; that's just exactly one of the main points about his knowledge of these leases. How did he treat them, as being in existence or out of existence and what term did he treat them as having?

The Court: Well, there are two ways of going at this, of course. The way we have been operating was for the witness to give all of the reasons in advance rather than on cross-examination. I am going to sustain the objection to the question on the ground that so far there is no showing that this witness has any detailed knowledge of the specific terms and conditions of the various leases under which this plantation operates. [1557]

Mr. Vitousek: If the Court please, we note an exception.

The Court: You may have an exception.

By Mr. Vitousek:

Q. Mr. Crozier, in your work did you have oc-

(Testimony of C. C. Crozier.)

occasion to study the leases involved in the Honolulu Plantation? A. I did.

Q. And how about the terms of the leases?

A. I am fairly familiar with them. I reviewed them.

Q. You have seen them?

A. I have seen all the leases. I have a copy of most of the leases. If not, I have a digest of some of the shorter leases.

Q. But in arriving at your opinion, you did have them?

A. I had the details of the various leases of Honolulu Plantation in making the study of the Honolulu Plantation for the purposes; also in the different condemnations of the Honolulu Plantation beginning with Hickam Field; we then had the then leases.

Mr. Rathbun: I object to Hickam Field. It is not involved in this case at all.

Mr. Vitousek: If the Court please, he's using it simply as an example of the study of the leases.

Mr. Rathbun: An example of the study of other leases doesn't show that he studied these.

The Court: I think it would be best that we confine [1558] ourselves to the leases involved in these 13 cases. That part may go out.

A. Well, I am familiar with the leases, that for the years in question, 1939 to 1944.

Q. The leases that were in effect during those years?

A. That's correct, such as they are.

(Testimony of C. C. Crozier.)

Mr. Rathbun: May I have the date?

(The reporter read the previous question.)

Mr. Rathbun: I object for that reason, the date itself, limiting it to January, '44.

The Court: Your objection to that is what?

Mr. Rathbun: The record shows that to January, '44, and excludes the very case we are working on.

Mr. Vitousek: He didn't say "to".

The Court: I think he did.

Mr. Vitousek: Well, you can move to strike.

The Court: You objected to it and it has already been asked and answered.

Mr. Rathbun: Well, I move to strike it, of course. That follows:

The Court: Not necessarily, Mr. Rathbun.

Mr. Rathbun: Well, I move it now.

Mr. Vitousek: If the Court please, if there is any question about it, I thought I said "through." I'd like leave to withdraw the question. There is no question but what we [1559] are confining ourselves to this date, June 21, 1944.

The Court: I don't exactly see why this answer should go out. It may later form a basis for an objection. But if the witness has said that he is only familiar with these leases up to 1944, well, what he has stated may be material. I am going to overrule the objection, the motion to strike, and you may have an exception.

Q. As of the date of this taking, June 21, 1944, are you familiar with the leases in effect as of that date?

(Testimony of C. C. Crozier.)

Mr. Rathbun: I object to that as incompetent, irrelevant and immaterial because there is no such date as that that is material in this case. It is the varying dates that are the takings here.

The Court: May I have that question again?

(The reporter read the last question.)

The Court: Your objection again to that question?

Mr. Rathbun: My objection is that there is no reason in this record for taking June 21, 1944. He is taking it for different times, 13 different cases. The taking of each acre of land, according to their theory, would change the situation.

The Court: In view of the order of consolidation in this case, that objection is overruled.

Mr. Rathbun: Well, for the record I will state that in answer to the Court's position on that that there is nothing in the consolidation order, as far as we are concerned—it's [1560] our contention—that changes or has anything to do with fixing the dates of takings.

The Court: You may answer the question.

A. Yes, I am familiar, if that is the date, June 21, 1944, I am familiar with the leases then existing of Honolulu Plantation.

Mr. Driver: Is the witness going to be permitted, your Honor, to impeach his own statement? Just a few minutes ago his testimony was specifically limited to leases up to January, 1944. After your Honor's ruling he is asked by counsel if he doesn't want to push that up until June, and he

(Testimony of C. C. Crozier.)

says yes he can do that. I don't think the witness should be permitted to do that in view of his point blank answer.

Mr. Vitousek: If the Court please, we are getting a wee bit technical in this case. The witness obviously, if he said that date, gone through '44, he can be asked what he meant by it. It's done frequently, the same as when I was reading directly from my notes and the Court said I said January and I have it right there June 21st. I can show it to counsel. That's getting a wee bit far-fetched in a case of this importance to make that kind of objection. In the first place, it isn't material. The witness can be asked if he gives an answer which counsel thinks is not right; he can be asked to straighten that out by appropriate questions, and that's what we are doing. [1561]

Mr. Driver: You can't impeach your own witness.

Mr. Vitousek: I am not impeaching our own witness.

Mr. Rathbun: That's what you think.

The Court: Proceed.

Q. I'll give you this question, Mr. Crozier. Assuming that on June 21, 1944, Honolulu Plantation Company had approximately 4,400 acres of cane land, both fee and leasehold, to be exact, 4,397.34 in use, and that on that date, 1,087.59 acres of cane land were taken away from it, what in your opinion was the fair value of all the property of said plantation before the taking and also the fair value

(Testimony of C. C. Crozier.)

of all the property of said plantation remaining after the taking, the property referred to being that at Aiea, Oahu, and excluding movable personal property and growing crops, taking into consideration your knowledge of the plantation, its holdings, the manner in which held?

Mr. Rathbun: I object to that for the same reasons that we objected to the original question.

The Court: The objection is overruled and you may have an exception. You may answer the question.

A. I would like to make a statement prior to answering the question, and that is——

Mr. Rathbun: I object to that at this time. The question calls for an answer, not a statement of the witness, unless he answers the question. [1562]

The Court: Can you answer the question?

The Witness: I can.

The Court: Please do so.

A. Well, without going into all the details, in my opinion that there is a diminishing value before and after of approximately 20 percent, or interpreted in dollars and cents about a million dollars.

Q. How did you arrive at that?

A. From my knowledge of Honolulu Plantation——

Mr. Rathbun: First I move to strike the answer, if your Honor please, for the sake of the record, on the grounds that I stated in objecting to the question.

(Testimony of C. C. Crozier.)

The Court: The motion is denied. You may have an exception. Now, the question was, How did you arrive at that figure? You may answer that.

A. I should imagine in my own opinion to answer it in details would take about two weeks.

Mr. Rathbun: We've got lots of time here.

Mr. Vitousek: Well, perhaps you don't understand the purpose of my question.

Mr. Driver: Maybe he does.

Mr. Vitousek: Maybe that.

A. From my own experience of other plantations and this plantation specifically, and as I understand Mr. Vitousek's question that the plantation has gone from something to something, [1583] that the thousand and eighty-seven acres is the decrease in area between the periods,—I understand that the after value is as of June 22nd, June 21st being the date of taking—but as I listen to the conversation here that these takings are of previous dates, that prior to June 21, 1944, different areas were taken, the total area is 1,087 acres, so that we've got to go back to a certain date to set up our before. And I assume that the before is June 21st and the after is June 22nd, that it was simultaneously taken and the plantation has been reduced by its 1,087 acres. We do know that the plantation of 4,400 acres is an enterprise of certain characteristics, and that the process of taking takes place, and that as the process of taking takes place there is a diminishing value somewhere. That can be ex-

(Testimony of C. C. Crozier.)

pressed in tangible items and intangible items. The tangibles so-called being the business enterprise or the over-all picture. The acreage itself is about 25 percent, a thousand, a little less than 25 percent. According to my figure, on one of our exhibits, from our records, it's 23 percent. And it appears to me that from my experience and knowledge of the situation that under this so-called before and after that on June 21, 1944, you have a plantation of 4,400 acres and its enterprise set-up being "X" value. We can say it's worth four millions of dollars, if I can use the so-called thousand dollars an acre rule. And on June 22nd, the day after they find themselves with a [1564] thousand acres less, then their over-all is worth three million, or the difference between the before and after is one million dollars.

Q. What is this thousand per acre rule that you mentioned?

A. Well, it's one of the methods that can be developed as the rate per acre for a leasehold plantation insofar as the value of money in an enterprise, in its capital as a leasehold plantation, to operate and produce sugar. And that will vary with the size and many factors in it. But I should imagine that the 30, the 25,000 ton plantation, as a leasehold, would require for a thousand dollars per acre of capital to carry on its enterprise, starting with the virgin land and taking the land and weeding it, fencing it, and the ditches and everything else that goes with the enterprise. So that if you use that rule, that would represent a thousand

(Testimony of C. C. Crozier.)

acres at a thousand dollars and would be a million dollars diminishing.

Q. Well, you stated you were familiar with the mill in this enterprise?

A. Yes, I have been in the mill many times.

Q. I want to ask you whether or not in your opinion that mill was as valuable and on the same assumption of takings after the takings as well as before the takings?

A. Well, in my opinion, no. [1565]

Mr. Rathbun: May I have that?

(The reporter read the last question and answer.)

By Mr. Vitousek:

Q. You stated that this was an irrigation plantation? A. I did.

Q. Had irrigation ditches, lined and unlined?

A. Pump system, both reservoir from water sheds and tunnel development and pumps.

Q. Bearing in mind the assumption that I gave, the acreage taken, I will ask you if in your opinion the property forming the irrigation system was as valuable after the taking as it was before?

A. It was not.

Q. Now, did it have a road system, bridges?

A. Yes, the main roads, feeder roads, and of different type, some semi-paved, and as they got into the vehicle transportation, field to mill, the roads became more substantial.

Q. And you say bridges?

(Testimony of C. C. Crozier.)

A. There were bridges, flumes, and all other plantation property for the purpose of growing cane in the different areas.

Q. Well, referring to the roads and bridges and other structures forming a part of the transportation system, in your opinion would those remaining on the lands after the [1566] taking be as valuable as they were before the taking?

A. Of course it largely depends upon the—in the aggregate of less value.

Q. In the aggregate? Mr. Crozier, did you have anything to do with arriving at the values of the lands involved in these cases belonging to the Damon Estate in this particular case?

A. You will have to give me the civil numbers.

Q. Civil 514, Civil 521, Civil 525, 527, 529, 532, 533, 535, 536, 540, 544, 548 and 684.

A. I did not have anything to do with the appraisal of any of these lands; that my relations with the Federal Government as appraiser stopped shortly after the war, save and except areas, two other areas, that are not within this area at all, that is, Pearl City peninsula and the so-called perimeter.

Mr. Rathbun: May I have that answer?

(The reporter read the last answer.)

By Mr. Vitousek:

Q. Did you have anything to do——

A. Later on I had a request, in view of my former status as an appraiser of other Damon land

(Testimony of C. C. Crozier.)

and other land of Aiea Plantation, and I was requested by the Navy to get the Navy Real Estate Department and Mr. Sam Damon, who had recently been discharged from the Navy, and found that Navy [1567] condemnations were pending, and I went into the whole matter and I submitted a report to the Navy Department which was, as I understand, was taken as a basis for the settlement of the Damon Estate condemnations. I also submitted a similar report for a settlement with the areas taken by the Army from the Damons, except that there is one of the items that was excluded, that is, the three hundred odd acres, the Army hospital.

Q. Well, did the report contain any appraisal of values of the land?

A. It reviewed the various values of the Government appraisers. It reviewed the Damon's contention of value. It further reviewed the Territory's values, which I served as an appraiser for the Territory in similar lands of the Damon Estate, all part of this national defense acquisition, such as John Rodgers Airport and other areas.

Q. And give a conclusion?

A. I did. I made a recommendation which I understand was taken as a basis of settlement.

Q. Now, did you in your conclusion of the values and recommendations take into consideration or place any value on improvements on land not involved in the takings? A. I did not.

Q. Or did you in any way consider, include any amount as damage due to severance?

(Testimony of C. C. Crozier.)

A. Did not. [1568]

Mr. Vitousek: If the Court please, it's 11 o'clock.

The Court: All right, we'll take our next recess.

(A short recess was taken at 11:00 a.m.)

After Recess

The Court: Proceed.

By Mr. Vitousek:

Q. Mr. Crozier, in connection with these lands shown in your Exhibit No. 14, the land there shown as agricultural, does that include sugar cane land leased? A. It does.

Q. Now, you say you made a study of the land holdings and tenures, land dealings?

A. Yes.

Q. What do the estates do with these lands to get income from them?

Mr. Rathbun: I object to that as incompetent, irrelevant and immaterial what these estates do with these lands, other than anything involved in this law suit.

Mr. Vitousek: If the Court please, it comes back to the original proposition that the way these estates derive their income, that they continue to lease them and it is their practice to renew the leases.

Mr. Rathbun: I know of one in this case that wasn't renewed.

The Court: Let's stick to the point that is before the Court.

A. Well, in the early——

The Court: Just a minute. I am still thinking

(Testimony of C. C. Crozier.)

about the [1570] objection. I am not too well satisfied as to the materiality but I am going to allow the question to be answered. You may have an exception. Now you may answer it.

A. As a general rule the lessors renewed the lease to the plantations, and especially in our rural areas we find in the lease, we find two things in the lease, and one is describing the demised premises to be leased, and second is a provision under rentals. As a rule we find a base rent which is predominating, that old leases had, and no other additional rent. As these leases were renewed to the first plantations, as I say, there was a better description of the property being leased, and in addition to the minimum rentals a percentage over and above that for additional rental by reason, I presume, of the prosperity of the plantation itself, its better price of sugar, its better earnings, and the sharing of the profit of the plantation.

Mr. Vitousek: That's all, if the Court please.

The Court: Cross-examination?

Cross-Examination

By Mr. Rathbun:

Q. Mr. Crozier, you are assistant, you are Deputy Tax Commissioner of the Territory of Hawaii, are you not?

A. I am. That's my official commission.

Q. And you are paid a salary in that position?

A. I am. [1571]

Q. By the Government of the Territory or the United States?

(Testimony of C. C. Crozier.)

A. By the Territorial Government.

Q. Your services day to day require your time and attention in that office? A. They do.

Q. A full day's time?

A. That's the law, from 8 to 4 and from 8 to 12 on Saturdays.

Q. How many hours have you put in working on this set of schedules and going over your testimony with anybody connected with the Honolulu Plantation or C. Brewer and Company in this case?

A. Well, that would be hard to estimate, Mr. Rathbun. I put in many an hour in the Government by reason of—in the field in the early studies of the plantation, from 5 in the morning until late at night; conferences with the Legislature and conferences with different people.

Q. I'm talking about this case, what you are testifying to here.

A. Well, confine me to dates, Mr. Rathbun.

Q. Any date that you please. I don't know what date you started to work on this that you testified to here in these schedules that you prepared, the exhibits in evidence.

A. Oh, I should imagine over a period of time since [1572] Mr. Courtney first contacted me.

Q. Mr. Courtney contacted you in connection with this trial? A. He did.

Q. This trial? A. No, he did not.

Q. That's what we are talking about, the cases in this trial.

(Testimony of C. C. Crozier.)

A. Well, I presume the time spent on the exhibits that I have introduced, I should imagine about three hours.

Q. On the exhibits? A. Yes.

Q. Have you talked with any of the lawyers about the testimony you were to give?

A. On the Exhibit 14? Yes, I have. I have talked to Mr. Vitousek and talked with you.

Q. How much time did you put in on that?

A. Well, I had two meetings with Mr. Vitousek, I presume the first meeting about an hour and the second meeting about a half hour.

Q. Now, Mr. Crozier—when did you first meet Mr. John J. Courtney?

A. In his first trip here, I believe in the trial of Barbers Point, Civil Case 432, I believe, and that was tried in July of 1941. [1573]

Q. And what was the first business that you had with Mr. John J. Courtney?

A. I had submitted a report as a Government appraiser in the Barbers Point Airport, and upon the arrival of Mr. Courtney to try the case, prior to the case, we went into a conference. That was followed by the trial in which I testified for the Government; followed later by trial of 436, Civil case 436. I believe I went on the grounds with Mr. Courtney. In Civil case 452, Aiea hospital. At the time that Mr. Courtney was here, the question of severance damages over and above the value of the land and improvements thereon was gone into, along with growing crops. I presume from his

(Testimony of C. C. Crozier.)

arrival in '41 until his departure in October of '41, considerable time was spent with him during working hours, after working hours, Saturdays and Sundays.

Q. Did you make appraisal reports in those cases that you mentioned at the request of Mr. Courtney?

A. Yes, I was one of the appraisers in 432, which is Barbers Point. I was one of the appraisers in 436, which is the Damon gore lot on the makai side of the road. I also appraised for the Hickam Field extension, which is a housing acquisition just outside the Navy gate. I also appraised for the Government the Aiea hospital site of 452.

Q. Any of those involve any Damon land?

A. 436 did. [1574]

Q. Any of them involve any lands on which the Honolulu Plantation Company had leases?

A. 436 did.

Q. Did you make an appraisal report on 436?

A. I did.

Q. Did you find any severance damage?

A. I made no report on the severance damage.

Q. You didn't find any, did you?

A. I made no report on it.

Q. Therefore, you didn't find any?

A. Well, I think the answer speaks for itself.

Q. You didn't make any finding on it?

A. I made no finding on it.

Q. Who was Mr. John J. Courtney at the time he hired you in these cases, as you understand it?

(Testimony of C. C. Crozier.)

A. Mr. John J. Courtney, as I understand, was Special Assistant United States District Attorney General.

Q. He was here in that capacity, was he not?

A. He came out to try the Barbers Point case, as I recollect, in the early part of '41.

Q. And he also had charge of these other cases that you mentioned where you had something to do with it? A. That's correct.

Q. In the same capacity?

A. I guess, yes. [1575]

Q. You saw Mr. John J. Courtney about a Congressional hearing that was going on in connection with some claim of the Honolulu Plantation Company involving the takings in this case, did you not? A. Yes, Mr. Courtney arrived here——

Q. Well, Yes answers it. When did you first talk to Mr. Courtney on that subject?

A. I presume two or three days prior to October 20, 1945.

Q. In what capacity were you talking? Was Mr. Courtney here at that time?

A. Well, my relations with Mr. Courtney were one of appraiser and he was the Government's attorney at that time, and we had many a session——

Q. In '45 was he a Government attorney?

A. In '41.

Q. I'm talking this time in connection with the Government claim.

A. Well, I presume when Mr. Courtney got back

(Testimony of C. C. Crozier.)

in '45, by reason of our relationship asked me if I wouldn't testify before this Committee, that he was out with relatives——

Q. Will you please answer my question. What capacity was he here in at that time?

A. Well, I presume he was attorney for the Honolulu Plantation. [1576]

Q. Didn't he tell you that?

A. No, I got it by deduction.

Q. Well, you knew it, then, didn't you?

A. Yes. He didn't specifically tell me "I am attorney of the Honolulu Plantation."

Q. Did you have any reason to believe that he was representing anybody else than the Honolulu Plantation Company?

A. No, I assume he was the Honolulu Plantation Attorney.

Q. You never had any reason to doubt it since, did you, that he was?

A. No, sir. That's what was his mission.

Q. He went over with you in that capacity, representing—he wasn't with the Government at that time, was he?

A. I believe not.

Q. You went over at that time with him several of the cases that you had worked on with him, did you not, discussing the claim of the Honolulu Plantation Company with him?

A. Why, the interview that I had with Mr. Courtney in '45 was rather of short duration, and whether or not——

Q. Whether short or long, will you please answer the question?

(Testimony of C. C. Crozier.)

A. I presume, Mr. Rathbun, some of the cases that I have been associated with him in '41 and prior were taken up.

Q. Well, were they or were they not?

A. I should imagine they were, Mr. Rathbun.

Q. What is your recollection about it?

A. They were, then.

Q. Well, all right; they were, then. Those are the very cases in which Mr. Courtney had hired you, some of them, that you have named here by civil numbers, and on which you were paid a fee by the United States Government, were they not?

A. That's correct.

Q. Have you been subpoenaed in this case?

A. I have not.

Q. You came here by the request of whom?

A. Mr. Vitousek.

Q. You came voluntarily, then? A. I did.

Q. Your position, Mr. Crozier, when you obtained it in the Tax Office, was that of a political job?

A. Well, all positions in government are political except the protection of Civil Service which we now have. My position at the original point was strictly an appointment of a department head, which I presume is political; as the Tax Commissioner would go, I would go.

Q. Now, in getting the position you had to have support of some of the influential people here, did you not?

A. Not at all. I believe I got my position by reason of my ability and experience and standing

(Testimony of C. C. Crozier.)

in the community [1578] and the assistance of the Honolulu Realty Board.

Q. You don't think that any of the influential people here, politically or business or otherwise, could in any way make your position uncomfortable for you if they saw fit to do it, that you are occupying now?

A. Oh, I believe they could endeavor to do so, Mr. Rathbun.

Q. They could, couldn't they, if they endeavored to do so?

A. Why, yes. Anybody in position, in government, has to be thick-skinned and subject to employment such as ours, and so forth, both Territory and County.

Q. In giving your opinion that you have given in this case, on this before and after theory, did you take into consideration at all that prior to the takings involved in this case, the Honolulu Plantation Company was an integrated enterprise engaged in a perfected synchronization of an agricultural industrial activity?

A. May I have that again?

(The reporter read the last question.)

A. Well, I am quite clear on the before and after, but the central integrated part is rather broad in scope. I think all those adjectives that you used are incorporated in the before and after premise of valuation.

Q. Then you did take those things into consideration? [1579]

(Testimony of C. C. Crozier.)

A. In which case they were taken into——

Q. Did you take them into consideration?

A. I did, then.

Q. All right. Did you take into consideration, in coming to that opinion, the amount of dividends that had been distributed to stockholders, the shareholders, going back to 1908 and respectively to 1924?

A. No.

Q. Not at all?

A. Except that we were cognizant of the dividend record.

Q. You what?

A. I was cognizant of the dividend record.

Q. Yes, I suppose you were. But did you consider it in arriving at this opinion you have given? That's my question.

A. Indirectly, yes.

Q. What do you mean by indirectly?

A. Well, part of the before and after value is earnings, and all other factors, so that a dividend record of a corporation is considered.

Q. In other words, it had some weight in arriving at the 20 percent or one million dollars difference that took place before and after in helping you arrive at that opinion of amount, did it?

A. Yes, it did.

Q. Did you, in arriving at that opinion, consider that [1580] the company, the Honolulu Plantation Company, in 1936 renewed or extended most of its major leases to 1965?

A. Yes, we considered on the before and after; it was a growing concern.

(Testimony of C. C. Crozier.)

Q. You considered that?

A. That's correct.

Q. And did you consider the property involved in these cases in connection with the Damon lease, that that lease was in effect after the date of its terms as shown by Exhibit 9-K in this case?

Mr. Vitousek: If the Court please, we object to that question. It is not a proper statement of the evidence. It shows there was a lease that expired in 1943 and a new lease from then to 1953.

Mr. Rathbun: I said by its terms, on the lease itself.

The Court: The objection is overruled.

A. Under the—may answer to the before and after in the setting of the amount is predicated on the basis that it was a growing concern and had these areas and could continue to carry on these areas as a sugar enterprise.

Q. Well, I'm much interested in that, but that isn't my question, Mr. Crozier. What you are stating doesn't answer my question. It isn't the purpose of the question. Do you understand the question? A. May I have it again? [1581]

Q. I will ask you again, in considering as you have said that you did, that 1936 the company renewed or extended most of its major leases to 1965—is that right? A. That's correct.

Q. Now, in that consideration, did you assume that in June 21, 1944, the date that you have used here in your opinion, that it had a lease on the properties belonging to the Damon Estate which are involved in these law suits?

(Testimony of C. C. Crozier.)

A. My before and after is predicated on the loss of a thousand acres. Now, I don't know exactly how much of the Damon acreage is of the thousand. If it's a part of the thousand acres, then it was considered.

Q. If you don't know the amount and assume that they didn't have a lease in June 21, 1944, of the Damon land involved in these cases, that would make quite a difference in your opinion, wouldn't it?

A. It would.

Q. And you don't know about that? No information on it?

A. Except that I am assuming that the thousand acres, the difference before and after, as I testified, is part of the enterprise area, can enjoy it as part of their enterprise.

Q. Do you know how much acreage was involved that belonged to the Damon Estate covered by the lease, Exhibit No. 9-K in this case? [1582]

A. I do not.

Q. Did you consider, in arriving at your opinion of value, the amount of money spent by the company in additional capital improvements and betterments in three years following the new leases?

A. Yes, that was a factor that came up.

Q. That means from 1936, then, doesn't it, as you answered that that was the date?

A. That is correct.

Q. You assumed that, didn't you?

A. No, we knew it to be a fact that the company,

(Testimony of C. C. Crozier.)

had subsequent to '36 put considerable additional capital in many items, principally their housing village, their plant, and other items.

Q. For instance, in 1937 if they put in a million dollars, that would have an effect and did have an effect upon your opinion, is that right?

A. It would.

Q. Is that right? A. It would.

Q. If they didn't put in but five hundred thousand, your opinion would be different than it would be if they put in a million?

A. No, it wouldn't.

Q. It would not? [1583] A. No.

Q. How much did they spend in 1937 for additional capital improvements and betterments?

A. I did know, Mr. Rathbun.

Q. Do you know now? A. I do not know.

Q. Can you give your opinion?

A. I do not know the exact figure as I sit here.

Q. How much did they spend in 1938 for the same purpose?

A. I don't know the specific figure.

Q. How much in 1939?

A. I don't know the specific figure.

Q. How much in 1940?

A. I don't know the specific figure.

Q. How much in 1941? A. Same answer.

Q. '42. A. Same answer.

Q. '43? A. Same answer.

Q. '44? A. Same answer.

Q. Did you take into consideration in arriving

(Testimony of C. C. Crozier.)

at this opinion that you have given that in June of 1939 there commenced a series of takings in which cane lands were lost to [1584] the United States and others, and that those losses continued up to the first of the consolidated cases and including the lands in the 13 cases being on trial here?

A. No, as I understand the question of Mr. Vitousek, as June 21, 194——

Q. Never mind Mr. Vitousek. Just answer my question.

Mr. Vitousek: If the Court please, he has a right to answer the question.

The Court: Please answer the question directly if you can, and then, if there is an explanation, you may give it.

A. I should imagine if you go back to 1939, Mr. Rathbun, your damage would be greater.

Q. I didn't ask you that. I asked you if you took into consideration what I asked you in arriving at your opinion.

A. Well, as I understand Mr. Vitousek's question, I stated that my opinion there was a damage of a million dollars.

Q. I heard that very distinctly.

A. Now, that million dollars has nothing to do with the takings of 1939.

Q. Then will you answer the question? Did you consider the takings other than those in these 13 cases on trial here? A. I did not.

Q. You don't think it would be the proper way

(Testimony of C. C. Crozier.)

to approach them, to consider those previous takings?

A. Well, bear in mind I am only confined to a picture [1585] of 4,400 acres versus 3,000 acres.

Q. I understand. But will you answer my question, please?

A. Why, I should imagine if they were brought into the picture there would be a greater damage.

Q. Did you give anything in this case because of any takings other than those involved in these 13 cases on trial?

A. Just these cases covered by a thousand eighty-seven odd acres.

Q. And the reason that you didn't is because you didn't think it should be done to arrive at the opinion that you have given, is that right?

A. I wasn't asked that.

Q. Well, I'm asking you now. Do you think it would be proper to do that to arrive at the decrease in value for these taking?

A. You mean by these takings back to '39?

Q. In these cases involved here.

A. Well, you are confining me to a certain acreage.

Q. Sure, I'm confining you.

A. If you will allow me to ask me to increase the acreage back——

Q. Will you please answer my question? That's all I can allow, Mr. Crozier, I'm sorry.

A. Well, then, I don't quite understand you.

Mr. Vitousek: If the Court please, we object

(Testimony of C. C. Crozier.)

to this question. It's an attempt to impeach a previous question. He's got a right to test his knowledge as to what he took into consideration. He says he has. He did not go back to this day.

Mr. Rathbun: This goes back to his reasons as to why he did or did not do these things.

Mr. Vitousek: And we submit it is not proper cross-examination.

The Court: Do you want the question read?

(The reporter read the question referred to.)

The Court: Do you understand the question?

A. I presume these taking—you are going back to 1939, aren't you?

Q. I am not. I am going to these cases. Please read the question again. You are writing there; no wonder you don't understand the question.

A. You talk about these questions——

Q. In these cases on trial.

A. Why, yes, certainly, as the basis of your opinion, it would, before and after——

Q. How would that affect your opinion?

A. The opinion stands, for it is in these cases of consolidation, as of June 21, 1944.

Q. But you know, don't you, that as a matter of fact [1587] all of the cases previous to the ones involved in these law suits were settled, and either the judgment of the Court that was entered released as against all claims and demands of any nature, or else the stipulation by which they were settled, as far as Honolulu Plantation Company was concerned, provided that? You know that, don't you?

(Testimony of C. C. Crozier.)

Mr. Vitousek: If the Court please. We object to that question as improper cross-examination. The records in those previous cases will speak for themselves. That's a very controversial issue, as counsel well knows. It's bringing up nothing that was brought up on direct. It's not cross-examining any matters involved in this case. The witness has testified as to what he took into consideration, and as to his knowledge of the action of this Court or counsel of previous cases is not proper cross-examination.

Mr. Rathbun: In answer to what counsel well knows, that that is a controversial issue, I don't know of any such thing. They settled for everything in this that was ever taken from Honolulu Plantation Company, and the records of this Court show in the cases on file in the Clerk's Office—everything except these 13 cases. Now, if this man took into consideration those other cases that were settled and released, all claims of any kind or nature, I have a right to know it. The other man did.

The Court: Well, whether they are or are not settled [1588] depends on what is on the record here in these cases.

Mr. Rathbun: Well, I am stating, your Honor, that is what is on record.

The Court: And that involves a legal question. But you may ask him what he knows about that and what he considered it to be.

Mr. Rathbun: That's all I'm after, what he knows about it. And I don't think it's a legal ques-

(Testimony of C. C. Crozier.)

tion. It's plain language. Nobody has ever raised any legal question on it.

The Court: There seems to be one here.

Mr. Rathbun: Pardon me, your Honor, may I ask him in what respect that particular thing is in question?

The Court: You and Mr. Vitousek don't seem to agree.

Mr. Rathbun: The record shows that he's wrong. They're on record. The Court takes judicial notice of its own files. We can get them if your Honor wants to see them.

The Court: I have seen them.

Mr. Vitousek: Counsel knows very well that this was an issue before the committee that came out here, and the United States representative who tried the case went on the stand himself and testified contrary to what counsel is now telling the Court.

The Court: I don't know anything about that. We are getting away from the point of the question.

Mr. Rathbun: It's not what he testified. What the [1589] judgment shows is that it was complete satisfaction of all claims. That's final, no matter what anybody testified.

The Court: The witness may answer the question.

A. Mr. Rathbun, I presume you are pertaining to the stipulation that was entered into between the Government and Honolulu Plantation, of which

(Testimony of C. C. Crozier.)

some two hundred thirty-eight or two hundred thirty-nine thousand dollars was paid. Now, I don't know for sure.

Q. Not these cases on trial, you understand that, that are on trial? You understand that, don't you?

A. I understand that that stipulation does not include these. Now, just what that stipulation covered, what condemnation suits that I was involved in, I'm not sure.

Q. I didn't ask you the ones you were involved in. I asked you about your knowledge about that settlement.

A. I have very little knowledge about the settlement.

Q. You never heard about any that released all claims and demands?

A. Except that the document was presented to me at this House hearing here. It's the first time I ever saw it.

Q. You never heard it talked about with anybody?

A. No, no.

Q. Never in your life?

A. Mr. Wickam never talked to me about it at all. I have no idea of how—— [1590]

Q. You found it out in connection with that claim when Courtney was here, the Government claim?

A. That's the first time that I saw the stipulation.

Q. Well, you saw it then, didn't you?

A. I did.

(Testimony of C. C. Crozier.)

Q. And that was before you made up your mind to an opinion that you testified to here, wasn't it?

A. Well, that was after I had already made up my mind.

Q. Before you testified here, though, wasn't it.

A. Today.

Q. Yes. A. Yes, certainly.

Q. Now, did you consider again, in the face of those judgments and stipulations, that you knew about that in June of 1939 that there commenced a series of takings in which cane lands were lost to the United States and others and that the losses continued up to the first of the consolidated cases being tried here?

A. Cane lands lost to the United States?

Q. Well, read it again.

(The reporter read the last question.)

A. What lands of the United States did the United States lose?

Q. I didn't say they lost any. I didn't say that.

A. May I have that question again? [1591]

(The reporter reread the last question.)

A. I don't understand your question.

Q. You don't understand?

A. I can't understand how the United States lost it.

Q. I didn't say the United States lost it. I said lost it to the United States.

Mr. Vitousek: If the Court please, we don't like to object to this question but we submit it is not intelligible. How can you lose to somebody else? It may have been taken.

(Testimony of C. C. Crozier.)

Mr. Rathbun: I don't know.

Mr. Vitousek: We don't know either.

Mr. Rathbun: We had an expert testifying to it that way. I wondered how he knew, too.

The Court: Well, to those of us who have been with this case from its start, that phrase has a meaning. It may not be intelligible to someone else. If the witness says he can't answer the question——

Mr. Rathbun: He says he doesn't understand it. That answers the question.

Q. You don't understand that question?

A. You're getting too involved for me, Mr. Rathbun.

Q. Supposing that in 1940 the United States took 500 acres of land by a condemnation suit, just assume that, if you please, the year 1940, and that that suit was settled by a judgment in the Court in which the judgment recited that it [1592] was in full of all claims and demands and damages resulting to the Honolulu Plantation Company because of the taking involved in that case, would you consider that in arriving at how much had been depreciated in value the lands involved in 13 cases in this hearing?

A. Yes, I should imagine it will affect my million dollars finding.

Q. How would it affect it?

A. Well, my million dollars finding is confined to a thousand acres. But prior to that you now set up that in 1940 there was another five hundred. I should imagine it would have some effect on it.

(Testimony of C. C. Crozier.)

Q. What effect would it have? You are the one that knows, on your opinion.

A. Well, it all depends, Mr. Rathbun, on many factors in my opinion.

Q. What are the factors?

A. You'd have to then go back to your date of 1940 and set up a premise of before and after versus the premise of June 21, 1944, before and after. And I made no study of that. I'd have to.

Q. You said you took it into consideration, didn't you?

A. Well, mine is an over-all picture; my experience goes further back than that.

Q. Please stick to the question, Mr. Crozier, and [1593] we'll get along so much faster. Will you answer the question?

A. Well, I think I did. I endeavored to say that if you are now going to put in the 500 acres it would change my picture of the so-called before and after damage.

Q. I didn't ask you if we are going to put it in. That wasn't my question. I told you to assume the fact that that had happened the way it did, namely, once more, there had been 500 acres taken in a law suit by the United States Government to condemn some land; a judgment was entered in that case and a release, and judgment was in full for all claims, damages of any kind or description arising out of that condemnation in 1940, would you consider that circumstance the fact that they took that land, that it was released, and the payment that was

(Testimony of C. C. Crozier.)

made, and the judgment that was entered that was in full release of all the claims and demands, would you consider that in arriving at the before and after value of the land involved in the 13 cases on trial. If so, to what extent?

Mr. Vitousek: If the Court please, that is a double question. Why couldn't we leave that alone?

Mr. Rathbun: Leave out the last. All right, I'm trying to save time. Leave out "to what extent."

A. Is your 500 acres in these suits? They are not, are they?

Q. It's not in these suits. That's my assumption. [1594]

A. Then your 500 acres of 1940 would have no effect on my million dollars estimate.

Q. Now, you finally answered. And you didn't consider, therefore,—asking you the question again—that in June, 1939, there commenced a series of takings in which cane lands were lost to the United States and others and that those losses continued up to the first of the consolidated cases being tried here? A. I did not.

Q. That wouldn't be your method of arriving at the valuation of the before and after in these cases, would it? A. It would not.

Q. It would be wrong, wouldn't it?

A. I'm not here to say whether it's right or wrong.

Q. What do you consider——

A. It's my own opinion.

Q. —that it's wrong? A. No.

(Testimony of C. C. Crozier.)

Mr. Vitousek: If the Court please, that's improper cross-examination. He said that's his opinion. Now he is testing what other people think. He is entitled to think what he meant.

Mr. Rathbun: I want to find out.

Mr. Vitousek: It's very clear that he had not taken it into consideration. [1595]

The Court: Proceed.

Q. Did you consider in arriving at your opinion that you have testified to here that following the takings in 1939 the company was able to make replacement of cane at higher elevations, cane land, replacement of cane land? A. I did not.

Q. Do you think that's a proper item to be taken into consideration in arriving at the value of the before and after in these cases?

A. I do not.

Q. I notice in Exhibit 16 that you have identified here, made up by you, that as of January 1, 1935, the Honolulu Plantation Company had under lease 4,811.73 acres of land, cane land; that on January 1, 1939, they had under lease 4,929.55 acres of cane land, which is more than they had on hand January 1, 1935. There were condemnation suits taking Honolulu Plantation land between '35 and '39, were there not? A. There were.

Q. How do you account for the fact that they had more after those takings in 1939 than they had in 1935?

A. These figures of January 1, '35, January 1, '39, are the areas in cane under lease by the Hono-

(Testimony of C. C. Crozier.)

lulu Plantation, and that's the areas that are growing cane. Now, in '35 they might have had 5,200 acres of—4,811 acres of cane and some potential cane land. [1596]

Q. Did they?

A. They, the Honolulu Plantation, had additional areas that from time to time they could go to.

Q. How much in 1935 out of the 4,811 acres was that kind of land?

A. Well, the 4,811 acres is actually the area in cane.

Q. That's what I thought. Now, therefore your statement is immaterial, isn't it?

A. There's a plus acreage to that.

Q. Never mind any plus acreage. I'm asking you about that particular acreage, 4,811.73 acres.

A. Is what they had in cane.

Q. And also 4,929.55 is what they had in cane in '39, isn't it?

A. That's correct.

Q. Now, how do you account for the fact that they had more in 1939 than they had in '35, although the Government had taken acreage away from them in those years in condemnation suits?

A. Well, between the periods of '35 and the end of December, '38, they had gone on to other areas and developed this cane land.

Q. They were able to get other areas to develop to replace what the Government had taken?

A. No, I don't think it was areas that—that they [1597] already had under lease in 1935 was not used as cane.

(Testimony of C. C. Crozier.)

Q. Well, how did they get the additional land with the Government taking some of it away after '35?

A. Well, they just increased their acreage of certain Bishop Estate areas or McCandless lease area.

Q. You mean by additional lease?

A. No, same areas under lease.

Q. Some vacant land that they had?

A. Some land that was potential cane land in '35.

Q. How much potential cane land did they have January 1, 1935, that was not actually in cane?

A. I haven't any idea.

Q. You never tried to find out?

A. Only a limited area to my knowledge.

Q. Well, by limited—you have no idea, then you say it's limited?

A. A couple of hundred acres.

Q. What?

A. Maybe four or five hundred acres.

Q. In '35? How much did they have on January 1, 1939?

A. I should imagine about, maybe three hundred acres that they could find.

Q. In arriving at your opinion that you have testified to in this case, did you consider the book value of the company at various times as shown on their books? [1598]

A. Well, I was fairly familiar with the books——

(Testimony of C. C. Crozier.)

Q. I didn't ask you that. Did you consider it, is my question?

A. Well, I had it in mind, yes, Mr. Rathbun.

Q. What's that? A. I had it in mind, yes.

Q. Then you gave it consideration?

A. It was part of the findings.

Q. And it is part of the material on which you based your opinion of value, before and after, that you have testified to? A. It is.

Q. In arriving at the opinion that you have given here, did you take into consideration the earnings during the years prior to the takings in this case?

A. Yes, that's part of the study.

Q. And it had an effect upon your opinion of value, did it? A. It did.

Q. Your valuation was based in part, in other words, upon the earnings from year to year of this company?

A. One of the items in forming my opinion, yes.

Mr. Rathbun: May we take a recess now, your Honor?

The Court: Yes.

(A short recess was taken at 12:00 noon.)

After Recess

The Court: You may proceed.

By Mr. Rathbun:

Q. Now, Mr. Crozier, you have testified as to your source of information about these various things, among other things to certain appearances and schedules, certain appearances made by owners

(Testimony of C. C. Crozier.)

and lessees, schedules filed by them before your tax body, is that right? A. That's correct.

Q. Just what does that schedule that they file show? Are those public records?

A. They are.

Q. What do they show in general?

A. We tax in rem to the owner or owners thereon, and the owner comes in and identifies these parcels by our mapping system and checks out his nature of title of a color of title, whether it's a Land Court or L.C.A. or a grant and admits the area on the parcel. They advise us that the property is under lease, or occupied or tenanted by certain individuals or an individual. And we turn, if it's large areas, especially in rural areas, we turn to the lessee or occupant or tenant, whoever it might be——

Q. Is this in the schedules, now?

A. Yes. And they classify them as to the different types of land by reason of use, cane, pineapple, or ranch, [1600] what it is, attributable areas that go with it, as I have heretofore stated, and any other areas that are not part of the enterprise; that is, the occupant submits that.

Q. And from that schedule you may agree or disagree with the classification, is that correct?

A. Yes. In the early stage we disagreed considerably but we find out——

Q. Do you or do you not? A. We do.

Q. Then do you have hearings, have oral hearings, people making their contentions orally on it?

(Testimony of C. C. Crozier.)

A. On classification, no. It is a matter between the tax office and the owner or the lessee.

Q. Well, the owner or the lessee, do they make an appearance there and give you their contentions that your classification is wrong?

A. We generally call them in and tell them their classification is wrong.

Q. And do you allow them to argue against it?

A. They do; we do.

Q. And you have quite protracted hearings on that, do you not?

A. Yes, and we go to the grounds and try to solve the problem right on the grounds.

Q. Is there a court reporter present at those hearings [1601] to put down the contentions of the property owner?

A. No, that's strictly informal conversation between tax payer and assessor.

Q. There is no record made and there has been no practice made by the tax office to record the contentions made orally by an owner in regard to his assessment valuation for tax purposes, no record of it that anybody can go over and look at to see what they contend?

A. Not at that stage.

Q. At any stage?

A. Yes, we have had certain cases where we have disagreed on classification and rate, the applicable rate to the classification, and that is in the Tax Appeal Court, and that's a judicial court of record with stenographic and reporters' notes.

(Testimony of C. C. Crozier.)

Q. That's after it gets away from your office?

A. That's correct.

Q. As far as your office is concerned, there is never any record made of that?

A. None at all.

Q. That anybody could look at?

A. That's correct. Anybody can attend but there is no written record kept of these interviews.

Q. So anyone wanting to look it up afterwards to find out what they had contended as to certain things as you had [1602] assessed as to valuation, there is nothing to look at afterwards as a record?

A. Except their classification.

Q. Except their schedule of classification?

A. That's correct, and ours.

Q. Did the Honolulu Plantation Company ever appear before your tax body in regard to the taxation on the land involved in these cases on trial?

A. They have.

Q. Did you have any controversies with them or disagreements as to classification?

A. We did.

Q. Did you have any hearings on it?

A. Yes, we had conferences on it and went on the ground and endeavored to solve the classification problem on the ground.

Q. No record of what took place there that anybody can get was made of record?

A. No. The differences never went to litigation insofar as our Tax Appeal Court.

Q. They made certain contentions, did they, about the value of their lands?

(Testimony of C. C. Crozier.)

A. Both, as to classification value, yes.

Q. Did you go into the question of invested capital with them on those hearings at all? [1603]

A. That is, partly; that is a separate item, Mr. Rathbun, that came in to a study of the cane land values that were established for taxation purposes.

Q. Yes, I understand that.

A. That's correct.

Q. Will you answer my question?

A. It was considered.

Q. You had such hearings on that?

A. Yes, we reviewed their capital structure and their assets and the items that constitute the real property values—personal.

Q. In 1936 did they produce evidence, and was there discussion of their capital investment that year in connection with taxation?

A. I am not sure what year, Mr. Rathbun, but I believe every year we have had some dispute or argument with Honolulu Plantation.

Q. In regard to capital investment?

A. Not specifically.

Q. Well, generally?

A. Indirectly, yes, but the main argument being classification of their lands.

Q. All right. That's fine. The main argument. But did they represent to you in 1945 what their claimed capital investment was? [1604]

A. They did not.

Q. Did they in 1944?

A. Yes, I believe in the year, in the latter part

(Testimony of C. C. Crozier.)

of '44, the plantations were re-studied for revaluation purposes.

Q. Will you answer my question, please?

A. They did.

Q. Did you take into consideration in arriving at the opinion that you have testified to in these cases the capital investment of this company over the different years?

A. In our study of determining the average over-all rate for Honolulu Plantation it was taken into consideration.

Q. Did you go into the book value of the permanent investments in those hearings of the Honolulu Plantation Company?

A. Insofar as the buildings, no, because the book value of buildings is not in accordance with the provisions of the law to arrive at tax value for the improvements.

Q. Will you please answer my question?

A. They were considered, Mr. Rathbun, and eliminated where they didn't affect tax values.

Q. They came before you and stated what they contended was the book value of the permanent investment, is that right?

A. No, not that one figure, no, certainly not.

Q. Never did that?

A. No, that has nothing to do with our— [1505]

Q. Did you consider that at all in the opinion that you have arrived at in this case?

A. The one figure, no.

Q. What do you mean by one figure?

(Testimony of C. C. Crozier.)

A. You're talking about an aggregate over-all figure?

Q. I'm talking about the book value of permanent investments.

A. Which items? Certain items, yes.

Q. What items did you consider in that respect in your opinion?

A. If you will let me have a corporation exhibit, I'll pick a number of them out.

Q. I don't know what "corporation exhibit" means.

A. Will you let me have the annual statement of Honolulu Plantation for the year in question?

Q. Yes, you may have them; they are right there. A. You refer now to the year what?

Q. I didn't confine it to any year yet. I have asked you if they brought that out before you in these tax hearings.

A. Well, our last study was in the latter part of '45.

Q. All right, did they bring out the book value of the permanent investments?

A. Yes, we had the statement of 1944 available for use in our study.

Q. You remember what it was? [1606]

A. Offhand I do not.

Q. At the time you testified to your opinion in this case, did you have in mind what they claimed the book value of permanent investments were?

A. I was—

Q. In 1945?

(Testimony of C. C. Crozier.)

A. —I had knowledge of it, Mr. Rathbun; the specific figure, I don't.

Q. Can you give what it was that you took into consideration and what amount?

A. Well, insofar as our land study, we took in their book value of their land—related.

Q. You know what permanent investment means, don't you? A. I do.

Q. Well, that's what I asked you. How much was it in '45?

A. I haven't any idea of the figure, Mr. Rathbun.

Q. How much was it in '44?

A. I have no idea, no idea of the figure in '44.

Q. Still you considered it in arriving at your opinion of value in this case, is that right?

A. That's part of the factors, yes, sir.

Q. How about '43, what was it?

A. Same thing.

Q. '42 the same thing? [1607]

A. Same answer.

Q. '41 the same? A. Same answer.

Q. '40 the same thing? A. Same answer.

Q. Did you ever consider in connection with arriving at this opinion of value that you have testified to the possibilities of this mill being used for something other than the production of raw sugar?

A. Yes, for the simple reason that during these various times the mill was doing other things than raw sugar.

Q. Did you ever make a study to see what the

(Testimony of C. C. Crozier.)

possibilities were if they stopped making raw sugar? A. No.

Q. Have you ever thought about it?

A. Yes, I have my own ideas.

Q. They make molasses and they have for several years, didn't they for several years, molasses as a by-product of sugar? A. Yes, sir.

Q. Do you know any other by-products that that plant could be used for?

A. Cane syrup for hot cakes and the like.

Q. Many other fields in which the plant might be used other than developing raw sugar, isn't that right, in your [1608] opinion?

A. In my opinion, yes, it had possibilities for other activity.

Q. As a matter of fact, did you consider in arriving at your opinion that this company, Honolulu Plantation Company, in 1940 produced raw sugar at a cost per ton of \$54.62?

A. Yes, that cost of production is rather an important equation in our so-called productivity formula.

Q. If it cost them more to produce raw sugar than they could have bought it for, you'd take that into consideration in arriving at your opinion?

A. I wouldn't, Mr. Rathbun, I wouldn't go outside the scope; I'd be inclined to stay within the scope of the enterprise itself.

Q. Well, isn't that the enterprise itself, to develop raw sugar?

A. You sort of got the bull by the tail. You've

(Testimony of C. C. Crozier.)

got a plantation and you've got your own fields and your areas, and you have your competitor down the street—

Q. Will you answer my question, please?

Mr. Vitousek: He is entitled to explain his answer.

Mr. Rathbun: He hasn't made an answer. There's nothing to explain.

Mr. Vitousek: He did make an answer. He said he wouldn't go outside the enterprise. [1609]

The Court: Let's start all over again and have one person talking at a time.

By Mr. Rathbun:

Q. Would you and did you consider in connection with your opinion and in arriving at your opinion that you have testified to in this case that it cost the Honolulu Plantation Company in the year 1940, \$54.62 per ton to produce raw sugar?

A. I did.

Q. Now, why did you consider that?

A. Well, that's a rather important factor as the cost per ton of sugar.

Q. Why? A. Well—

Q. Insofar as your opinion is concerned.

A. —\$52.60 cost—there's a net profit per ton of sugar over the gross realizations; that's a low production of \$54.62.

Q. And that has an affect on the before and after?

A. That would affect earnings and many factors, what rent they could pay.

(Testimony of C. C. Crozier.)

Q. That would affect your valuation of before and after that you testified to?

A. Indirectly, yes, Mr. Rathbun, certainly.

Q. And if they produced raw sugar at a price which was greater than they could bring it, than they could buy it for, that would affect your opinion, too, wouldn't it? [1610]

A. No, I doubt if it would, because they've got to stay within their enterprise. You can't go afield and say we'll go down to Ewa and buy Ewa for half and close up what we've got.

Q. Supposing they did go outside, whether you like it or not, and buy raw sugar?

A. Well, if it was physically present and the like, it might be taken into account.

Q. Would you take it into account, and did you take it into account?

A. How much, one ton or 90 percent of their products?

Q. Supposing that it cost them in the year 1940, \$54.62 a ton? Supposing it cost them in 1940, \$54.62 to bring the sugar to a refined stage, whereas they could buy the raw sugar and bring it in at \$51.88, would that have any effect upon your opinion that you have testified to?

A. That would depend upon many factors, as to the amount and who they buy it from, and what is the stability of flow—

Q. Who to buy it from if they buy it for less?

A. How are they going to buy? How long?

Q. That's a fact—let's assume, it please.

(Testimony of C. C. Crozier.)

The Court: Just a minute. Just a minute, let the witness answer the question and then you ask your next question.

Mr. Rathbun: If he'll answer it, I'll get along fine, but he doesn't answer them. That's the trouble. That's what [1611] makes the trouble.

The Court: You cause more trouble by asking additional questions before the witness answers one question.

Mr. Rathbun: Well, that's my way of directing my attention to what he's driving at.

The Court: I realize that, but it causes confusion.

Mr. Rathbun: Well, I don't know any other way of doing it.

Mr. Vitousek: If the Court please, may I interpose an objection? He was answering and he gave a sensible answer.

Mr. Rathbun: And I contend it had nothing to do with my question.

The Court: Have you finished your answer?

The Witness: Yes.

By Mr. Rathbun:

Q. You have seen the claim prepared by the Honolulu Plantation Company for filing with the Congress of the United States, have you not?

A. I have.

Q. Government Exhibit No. 1 for identification in this case. And you have likewise seen table No. 2 attached to it, have you?

(Testimony of C. C. Crozier.)

A. If this supposition—if this exhibit is the same as I have.

Q. Well, look at it and see. It's the only one I have [1612] and know anything about.

A. If table 2 is the same one as I have, and I presume it is.

Q. What do you mean "you have?"

A. Well, I'll have to get my copy and go through it page for page. There may be an amendment or an adjustment.

Q. You know what you saw, don't you, before you testified in this case?

A. But this is a voluminous book with lots of schedules in it.

Q. I'll guarantee you that.

A. You'll have to wait until I check my copy versus this.

Q. Where is your copy?

A. At the tax office.

Q. Well, I want to ask questions on that, so you had better get it. I can't go any further with it until I connect it up with this particular exhibit.

The Court: How long would it take you to get your copy?

The Witness: About five minutes.

The Court: All right, we'll take a brief recess.

(A short recess was taken at 12:33 p.m.)

After Recess

By Mr. Rathbun:

Q. All right, now? [1613]

(Testimony of C. C. Crozier.)

A. This table 2 on this copy I have never seen.

Q. Never seen it?

Mr. Vitousek: Which copy?

Mr. Rathbun: Marked Government Exhibit 1 that I have asked about.

Mr. Vitousek: That's all I'm asking.

The Court: But this isn't clear. That's the point.

A. My table 2 in my copy is not the same at all.

Q. What copy have you got?

A. I've got a copy. It says "Before the Congress of the United States, Washington, D. C."

Q. All right, where did you get it and when?

A. Mr. Kay gave it to me.

Q. When? A. Prior to 1945.

Q. Prior to 1945? Have you ever seen this one before? Examine it clear through, will you please?

Mr. Vitousek: "This one," I'd like the record to show what counsel means.

Mr. Rathbun: Government Exhibit 1, the one that I'm talking about.

The Court: For identification.

A. I understand, Mr. Rathbun, there was an amended or revised one made, and I have seen it around somewhere, but it is not my copy. [1614]

Q. You have seen what around somewhere?

A. The revised one.

Q. I don't know anything about the revised one. There hasn't been any in this case. I'm asking you about this one now. Did you ever see that one before, Exhibit 1 for identification?

A. I can't say for sure, Mr. Rathbun.

(Testimony of C. C. Crozier.)

Q. You can't say for sure?

A. No, I do know that I have—

Q. Never mind that.

A. —a copy here that has not the same schedule 2, and I understand this one was revised, and you must have the revised one.

Q. Which was revised?

A. The one that you have.

Q. Are you sure of that?

A. I understand this was the first.

Q. You mean by "this" the one that you produced yourself? A. Yes.

Q. That was the first one?

A. The one that I have in my possession.

Q. And the one that I have was the one they finally revised and filed with Congress?

A. I haven't any idea whether they filed it in Congress. [1615]

Q. Well, this is the second one of Government's Exhibit 1, is the revision, then?

A. It must be.

Q. Is that what you say?

A. It must be, Mr. Rathbun.

Q. Then confine your attention to Government Exhibit No. 1 that I am showing you. If it appeared in that document on table 2 attached to that exhibit that raw sugar cost the Honolulu Plantation Company \$51.05 to produce and they bought it in that year from outside people for \$48.48, would that make any difference in the opinion that you have testified to in this case?

(Testimony of C. C. Crozier.)

A. It would not.

Mr. Vitousek: If the Court please, may I have my objection? It does not so appear in the statement counsel is handing the witness. And I think that should be called to his attention. It is the cost of refined sugar and not raw, the figure that he is giving, in his own schedule. Now, if he is making an assumption—

Mr. Rathbun: It says outside raws price paid.

The Court: One at a time.

Mr. Rathbun: I want to show it to your Honor. Argue over what it means—here's what it says. (To Mr. Vitousek) If you will let me do this first. "Cost after credit, outside raws, sugar purchased, 96°, refined made, price paid, \$48.48." [1616] And here is your refined in the next column, as I read it.

Mr. Vitousek: If the Court please, that's all refined.

Mr. Rathbun: Yes, the second column.

Mr. Vitousek: They are not the ones that you are reading.

Mr. Rathbun: What are not the ones I'm reading?

Mr. Vitousek: You gave a figure of the plantation of fifty-four.

Mr. Rathbun: Fifty-one is what I asked him last, and this one. And that's raw.

The Court: I think the question is all right.

Mr. Rathbun: I asked my question.

(Testimony of C. C. Crozier.)

The Court: The objection to the question is overruled. Now, you may answer it.

Q. Your answer was no, is that right?

A. That's correct.

Q. And if the Honolulu Plantation Company in the year 1941 produced raw sugar for \$54.55 a ton and paid \$51.76 per ton for it from outside people, would that in any way change the opinion that you have given in this case? A. It would not.

Q. And in the year 1942, if it cost the Honolulu Plantation \$77.81 to produce raw sugar and they bought it from outside sources for \$70.06, would that make any difference in your opinion or have any effect on it? A. It would not. [1617]

Q. And if in the year 1943 they produced raw sugar for \$70.80 and bought it outside for \$61.79, would that make any difference in your opinion?

A. You said sixty-one? It's—

Q. \$69.79. A. It would not.

Q. And in the year '44, if it cost them \$101.75 to produce a ton of raw sugar and they bought raw sugar at \$71.04 per ton, would that make any difference in your opinion? A. It would not.

Q. Did you take any consideration of the fact, in arriving at the opinion you have testified to here, that this was economically operated company? A. I assumed that.

Q. If they could buy raw sugar for less than they could produce it for, that would not be economic, would it?

A. On the face of that statement, no.

(Testimony of C. C. Crozier.)

Q. That's what I am confining it to, that statement.

A. That's correct.

Q. It would not show an economically operated company, would it?

A. Just confining it to those two figures, no.

Q. It means they are losing \$30 a ton by producing raw sugar themselves?

A. By that arithmetic, yes. [1618]

Q. I show you the same Government Exhibit 1 and ask you whether or not you have ever seen table 9 contained in that exhibit attached to it?

A. Your table 9 in your Government exhibit is evidently a revised one compared to the one that my table is.

Q. The figures at the top of that table are substantially the same as the ones in the table 9 that you have in your document, are they not?

A. So far as the last column is concerned.

Q. The last column under the word "total"?

A. That's right.

Q. And what does that represent as you see it on this document?

The Court: Exhibit 1?

Mr. Rathbun: Yes, **Exhibit 1**.

A. Table 9 is the allocation of depreciated items—table 9 of the Government's Exhibit 1, allocation of depreciated property items to the remaining acreage reflecting measured burdens per acre.

Q. Now, what does your table 9 show as a heading?

A. Book value of property investments.

Q. Now, on the totals for the years 1936 to 1945,

(Testimony of C. C. Crozier.)

not including '45, the figures under the word "totals" are practically the same, are they not, varying a thousand or two dollars, that's all?

A. For the year '44 or '45?

Q. Leaving out '45.

A. Well, if the outside total of '44 is exactly as to the—

Q. Yes, but the rest of them only vary a thousand dollars or so, isn't that it?

A. There's variance all the way through. That's correct.

Q. Can't you look at it and tell whether I am right in that statement?

Mr. Vitousek: We'd like to stop objecting and let it go, but I can't understand this. We object to this line of cross-examination as to the difference of the book Mr. Crozier has and the book counsel has. It's got nothing to do with the case. It's a mere exhibit for identification, and what has it got to do with this cross-examination or any testimony given by this witness on direct examination?

The Court: I don't know at the moment, but it may lead to something. Proceed.

Q. Tell me the difference, if you can't do that the way I did it with my naked eye, just going over the amount in the last column of the total at the top of that table 9 that you have and table 9 that's in Government Exhibit 1 for identification, what your document shows for 1936?

A. \$2,840,716.28, which is the same as your exhibit. [1620]

(Testimony of C. C. Crozier.)

Q. All right. What is there to show for '37?

A. \$2,906,684.47.

Q. Exactly the same, isn't it, as this one?

A. Correct.

Q. '38? A. \$3,128,753.49.

Q. The difference is, is it not, that this Government Exhibit 1 shows \$3,128,735.49?

A. That's right, as against my \$753.49.

Q. Yes. And '39?

A. '39, \$3,355,318.16.

Q. Exactly the same, is it not?

A. Exactly the same.

Q. And in '40? A. \$3,202,458.99.

Q. Exactly the same? A. The same.

Q. '41? A. \$3,024,248.89, the same.

Q. '42?

A. \$2,881,747.77, which is the same.

Q. '43? A. \$2,832,951 even, the same.

Q. No, it isn't the same. This document shows, Government Exhibit 1, \$2,834,591. [1621]

A. Well, you are two thousand dollars more.

Q. A difference of two thousand dollars?

A. Yes.

Q. '44?

A. '44 is \$2,799,410.39, the same.

Q. Now, what does this column of totals under the word "total" on table 9 in Government Exhibit 1 represent as you look at it?

A. I haven't the least idea.

Mr. Vitousek: That's been asked and answered

(Testimony of C. C. Crozier.)

and the witness is entitled to see it again. He read the title. The title speaks for itself.

Mr. Rathbun: That isn't the question. The question is, what does it mean to him? Because he saw the same figures that he had in front of him.

The Court: The question may be answered.

Mr. Vitousek: If the Court please, I'd like to have a further examination. I'd like to run throughout this. It's improper to examine a witness on an exhibit for identification.

Mr. Rathbun: Which I offered to put in evidence.

Mr. Vitousek: It hasn't been received. It hasn't been properly proved yet.

The Court: The objection is overruled. You may have an exception. Now, do you understand the question? Referring to the exhibit for identification, he is asking under that [1622] particular heading that he has previously referred to, what the total figure there means to you.

A. Well, by deductions table 9 says "Allocation of Depreciated Property Items to Remaining Acreage Reflecting Measured Burdens Per Acre." Whoever compiled the statement found some totals representing these odd millions of dollars.

Q. And in the copy that you have, it is called "Book Value of Property?" Now, what do you think it is or what it says on Government Exhibit 1?

A. I haven't the least idea, Mr. Rathbun. I haven't checked these.

(Testimony of C. C. Crozier.)

Q. What did you consider it as in arriving at your opinion of value in this case?

A. I never bothered with this in my opinion in this case.

Mr. Vitousek: What's this, what's this that the witness was referring to? He didn't bother with what?

A. So-called copy that I had from the Honolulu Plantation, as the petition that they filed or proposed to file before Congress, of the Honolulu Plantation.

Q. You testified in this case that among the other things that you considered was the necessary invested capital to run a plantation, did you not?

A. I did.

Q. Did you consider that those figures on table 9 of [1623] Government Exhibit 1 represent invested capital for the years that are shown?

A. I haven't any knowledge of what they mean, Mr. Rathbun.

Q. You never studied those figures in that table that you have in the document that you produced?

A. I read—

Q. Corresponding with these before you gave your opinion? A. That's correct.

Q. If the book value of the permanent investment of this company on January 1, 1945, was \$2,702,044.06, would that change your opinion that you have given in this case in any way?

A. It would not.

(Testimony of C. C. Crozier.)

Q. Assuming that that was the capital investment, would it change your opinion any?

A. It would not.

Mr. Rathbun: May we stop here, Judge? I can't get through.

The Court: Yes, it being one o'clock, we will adjourn for the day and resume tomorrow morning at nine.

(The Court adjourned at 1:00 o'clock p.m.)

Honolulu, T. H., December 20, 1946

The Clerk: Civil No. 514, United States of America versus 257.654 acres of land, and Civil Nos. 521, 525, 527, 529, 532, 533, 535, 540, 544, 548 and 684, for further trial.

The Court: Gentlemen, before we begin this morning, by conference had yesterday we have already agreed with reference to next week, which is Christmas week, that we will not have sessions the day before and the day after Christmas. I overlooked at the time I talked with you on that subject the fact that on Monday next a language school case is coming on for ten o'clock in the morning, for an application for an injunction. I have no means of telling now whether that will take five minutes or five hours or five days. I am wondering, in view thereof, if we should leave Monday free for the handling of that language school matter, and in view of the fact that the week will be thoroughly disrupted whether we should go to our original thought of passing the Christmas week by.

(Testimony of C. C. Crozier.)

Q. What did you consider it as in arriving at your opinion of value in this case?

A. I never bothered with this in my opinion in this case.

Mr. Vitousek: What's this, what's this that the witness was referring to? He didn't bother with what?

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Mr. Vitousek: If the Court please, having been here before in the language school litigation, I don't think it will be five minutes. I imagine it will be a good idea. In that connection I might state that I had talked with the attorneys for the Government, and our next main witness will be Mr. Spalding, and I think it will be very desirable if we [1625] can go on with continuity, that when he starts he finishes up. And I would suggest that when we finish with the witness this morning we can go over to the date fixed by the Court. And Mr. Spalding, incidentally, is very much tied up right now on matters that he was on the coast for, and that would be a great convenience. I think it would be better as far as the examination and cross-examination is concerned.

The Court: What is your reaction to this matter?

Mr. Rathbun: Well, we have no objection to doing it that way. I don't doubt that Mr. Spalding has plenty of matters to attend to today and tomorrow, just getting back.

The Court: Well, then, since it is agreeable to you both, we will suspend today, if we finish today with Mr. Crozier, and so far as this case is concerned it will not be entertained during next week at all but will resume on the 30th day of this month, which is a week from Monday.

Mr. Rathbun: O.K.

The Court: All right. And I assume that you are both ready to proceed this morning.

Mr. Vitousek: Ready.

CHARLES CAMPBELL CROZIER,

a witness in behalf of the Defendants, having previously been sworn, resumed and testified further as follows: [1626]

Cross Examination—(Continued)

The Court: Mr. Crozier, you are mindful of the fact that you are still under oath? You may proceed, Mr. Rathbun, on further cross-examination. By Mr. Rathbun:

Q. Mr. Crozier, you were asked a hypothetical question to assume that on June 21, 1944, the Honolulu Plantation Company had 4,397.34 acres of cane land in use, being fee and leasehold, and on that date 1,087.59 acres were taken by the Government. And you were asked for your opinion of the fair value as to all of the property, before and after, excluding movables and crops. In answer to that you said 20 per cent of one million dollars, is that correct? A. That's correct.

Q. Did you ever make an appraisal report in this case on the question that you have given an opinion on? A. I have not.

Q. Never put anything in writing?

A. I have not.

Q. Will you please tell the Court how you arrived at it? First, what value you arrived at as being the value of these properties before June 21, 1944?

A. On the basis of the Honolulu Plantation being a forty-four hundred acre plantation on June 21, 1944, and all the facts as I have gathered and

(Testimony of C. C. Crozier.)

as I have checked and as I have covered the plantation in my official capacity as a [1627] Territorial employee and as an appraiser for the Government, and at other times in the appraisal of estate lands, all within Honolulu Plantation, the study of its value, going back to the so-called Hickam Field taking and leading on down to June 21, 1944, followed by the taking of a thousand odd acres and the following day having a diminishing acreage—

Q. I didn't ask you about the following day, sir. I asked you before.

A. Well, then, I'll stop there. I have come up to my before value, roughly 4,400 acres, it would require a capital of \$4,400,000.

Mr. Rathbun: May I have that answer?

(The reporter read the last answer)

Q. And you value the market value of the properties of this company on the basis of the capital that would be required to operate it, is that it?

A. I didn't say that.

Q. Well, what did you say?

A. I tried to tell you that from my experience and having followed Honolulu Plantation both from my official capacity as a Territorial employee and appraiser for the Government and appraiser for the various estates, in the association or connection I have had with the area in question, plantation question, in bringing my findings down to a value of the enterprise for the 4,400 acres it would represent a [1628] capital of about \$4,400,000.

(Testimony of C. C. Crozier.)

Q. Now, what do you mean "it would represent a capital?"

A. Well, if on June 21, 1944, you had 4,400 acres and you wanted to produce sugar under the conditions that Honolulu operates in the nature of its enterprise and the like, you'd require \$4,400,000 worth of capital.

Q. Is that the basis upon which you valued this property before June 21, 1944? A. It is.

Q. Then you do base it upon the amount of capital required to operate it, is that right?

A. My idea of the amount of capital, yes.

Q. That's the basis of your valuation?

A. Well, it sums up to that, yes.

Q. Well, that's the basis, then, isn't it? Does anything else enter into it?

A. Well, all the other factors.

Q. Well, what other factors?

A. Well, I tried to tell you, Mr. Rathbun, that you have leaseholds and you have a mill and you have irrigation and you have all the items that make up an enterprise of this nature, that in summing it all up for 4,400 acres on June 21, 1944, you estimate a capital of \$4,400,000.

Q. Well, you mean by capital—what do you mean by capital? [1629]

A. A lot of money that a corporation would require to operate.

Q. And that's your idea of the value of the property, the capital that would be required to operate? A. That's correct.

(Testimony of C. C. Crozier.)

Q. You value this upon no other basis than that, then, before the takings?

A. That's correct.

Q. Did you value that, in giving your valuation, from the standpoint that some purchaser would pay that for it?

A. Where I assume in my—after I have made my deductions and came to my findings, and had arrived at \$4,400,000 of value, that a purchase and sale could be made.

Q. In other words, you assume in that answer that an alleged buyer, interested in buying this sugar plantation, would pay on the basis of the capital required to operate it for its assets, is that right?

A. That's correct.

Q. Is that the usual way to appraise property?

A. Well, I don't know from my experience of any usual way of appraising property. I think a man has to have the ability, he has to have the years, he's got to make a study, and after all he estimates his opinion of value.

Q. He estimates? That's just about what he does, doesn't he? He doesn't figure it on dollars and cents, does he? [1630]

A. Well, eventually your estimate is dollars and cents.

Q. It's a good guess, isn't it?

A. Well, if you want to belittle it to calling it a guess, go right ahead, Mr. Rathbun.

Q. I don't want to belittle anything. I asked you a question, sir. Will you please answer it?

(Testimony of C. C. Crozier.)

A. I don't think it is a guess at all.

Q. You don't think it is a guess?

A. No, I don't.

Q. How much did you value the mill property so-called?

A. I didn't value the mill property.

Q. You didn't go in and study the depreciation of the machinery? A. No, I did not.

Q. Don't you think a buyer, prospective buyer, would do that? A. He would not.

Q. He wouldn't pay any attention to how much worn out the machinery was, how much life it had left?

A. Yes, he'd make an inspection of it.

Q. For what purpose?

A. With the idea of purchasing it, that he'd acquire it. He'd have somebody that would have more knowledge of the mill than he had; he'd ask the man, I presume the mill engineer, or he'd get somebody that was qualified to pass on the kind of [1631] mill and its efficiency and its condition.

Q. Yes? He'd be interested in that, wouldn't he, to know whether or not the machinery is worn out so that it only had, for instance, a couple of years life left, before he paid money for it?

A. If he was a prudent and wise buyer, yes.

Q. You wouldn't do that in making a valuation, though? A. Yes, I would.

Q. But you didn't do it? You took the amount of money required to operate it?

(Testimony of C. C. Crozier.)

A. I understand the mill. I went through it. I know the mill engineer. I have talked to him.

Q. Yes, that's why I asked you what price did you put on it.

A. I didn't put any price on it.

Q. It didn't do any good to ask him all those things?

A. It did. I wanted to know whether I was buying junk or something to operate it as a going concern.

Q. How much did you put on the irrigation system in arriving at this opinion?

A. No specific item on the irrigation system.

Q. Did you try to make a valuation of that?

A. I did not.

Q. Did you try to investigate its condition insofar as depreciation? [1632]

A. I did not.

Q. Did you look at the books to see how much it had been depreciated?

A. No, specifically, no.

Q. Did you look at the books to find out what depreciation had been taken on the mill and the machinery in the mill?

A. I did not.

Q. So as far as your opinion is concerned, then, if the machinery in that mill couldn't be sold because of its obsolete or worn out condition for five hundred dollars even, you'd still make a valuation of this property including that mill on the basis of the capital required to operate the plant?

A. I'd still come back to my original \$4,400,000.

Q. Will you answer my question, please?

(Testimony of C. C. Crozier.)

A. May I have the question?

(The reporter read the question referred to)

A. Well, I should imagine after reviewing the plant and its efficiency and physical condition and the like, and in the light of possible present day replacement costs, and I found a mill that was only worth five hundred dollars, it might affect my \$4,400,000.

Q. Then you don't know what the mill was worth from that standpoint, do you? You said you didn't make any investigation of it.

A. I knew the mill was in good condition, it was [1633] efficient as it could be; that the question of discounting it down to a five hundred dollar mill never entered into my calculation.

Q. Of course it didn't. But it did in my question, didn't it? You didn't appraise this mill at all, did you?

A. I did not.

Q. Separately from the others? You are going to stick to that, aren't you?

A. That's correct.

Q. What about the rolling stock, engines, cars, etc.?

A. I did not.

Q. You made no investigation of the depreciation on those, their condition, how long they could be operated, how much life they had left?

A. Did not.

Q. That was of no consequence to you?

A. Yes, bear in mind that when I arrive at my four million dollars I know that I am getting cer-

(Testimony of C. C. Crozier.)

tain tangible assets, certain chattels that I have physically seen myself.

Q. Yes. Well, that's what I thought. That's why I'm asking you. Can't you give them a value if you know about them?

A. I didn't value them, Mr. Rathbun.

Q. That's what you said?

A. That's correct. [1634]

Q. You know about them but you disregarded them, is that it?

A. Well, I don't understand your question, "disregarding them."

Q. Well, they didn't enter into your valuation?

A. Insofar as item dollars?

Q. Yes. A. No, they did not.

Q. You just pulled that figure out of air, didn't you? A. I did not.

Q. You didn't base it on the value of any one item in this plantation? A. I did not.

Q. And if you didn't pull it out of air, then what did you base it on?

A. Well, as I understand the question put to me, that on June 21, 1944, there is a plantation, Honolulu Plantation, operating 4,400 acres of cane—

Q. Go on.

A. The following day you've got a thousand acres less. You have a diminishing in your overall enterprise, in my opinion, of one million dollars.

Q. You can't diminish it unless you know the

(Testimony of C. C. Crozier.)

value at the beginning of the year before, can you?

A. I don't know anything about the year before. I'm [1635] talking about the one day.

Q. I'm talking about the day before the take that you testified to. You can't tell anything about the application of what they took unless you know the value of what was there before you took it, can you?

A. Well, you have an idea of an over-all value.

Q. Well, I think you've got an idea. But I'm trying to find out what you are basing it on.

A. All the facts that I have tried to cover with you.

Q. Give me the facts.

A. Well, in the first place you've got 4,400 acres of grown cane.

Q. Yes, yes. They don't own that, do they?

A. They own a few acres of it.

Q. How many acres do they own, how many acres did they own the day before we took the property?

A. I don't know. I presume a hundred acres odd of cane.

Q. They didn't own anything else in cane involved in this case?

A. In these cases, you mean? I don't think they owned any of the fee in cane in these cases.

Q. What other land in fee did they own, in other land that they had the day before the Government took the property?

A. They had the mill sites.

(Testimony of C. C. Crozier.)

Q. How many acres? [1636]

A. I'm not sure. It's around, I think, the mill site is around some hundred acres; and then some scattered areas.

Q. Is that a guess?

A. That's just a guess from memory. I can get the exact figures.

Q. Well, I don't know what you can get. I'm asking you now.

A. Well, then, I'm just estimating from memory, Mr. Rathbun.

Q. Well, you had it in mind when you value the property, didn't you? A. That's correct.

Q. Well, how many acres did you base the value of the land that they owned in fee on?

A. I didn't specifically itemize that item.

Q. And you didn't have it in mind at all and you didn't attempt to value it?

A. I did. I knew when you are going to buy the mill you are going to buy the mill and the mill site, and you are going to buy the acreage.

Q. Yes, I know you are going to buy it. Just because you are going to buy it doesn't mean that you are going to buy it without knowing the value of it, do you? A. I had the specific area.

Q. Well, give them to me if you had them. We want to [1637] know what you based your opinion on. A. That schedule here.

Q. You never had it, did you? A. I did.

Q. What did you do with it?

A. It's over in my office records.

(Testimony of C. C. Crozier.)

Q. Why didn't you bring it here? You knew you were going to be cross-examined, didn't you?

A. Not to this extent.

Q. Did you imagine you were just going to testify to your opinion and be allowed to go?

A. I didn't know I was going to go down to the minute acreage of the reservoirs and the kuleanas and the exact area of the mill site.

Q. You didn't think you'd get into the actual value of this that you testified to?

A. Not to the minute detail.

Q. Well, I'm sorry to surprise you. How many acres of fee outside of the mill site did they own?

A. Well, if you are going into that, Mr. Rathbun, I'll have to get the exact schedule.

Q. Well, I want to know what you had in your mind when you made this valuation.

A. I can't tell you the exact area.

Q. Can you tell what you had in mind when you made your [1633] valuation?

A. Yes. I'm trying to tell you that here was a plantation operating—

Q. Oh, yes, yes. I mean the acreage of the fee now.

Mr. Vitousek: If the Court please, I think the witness is entitled to answer without counsel interrupting all the time. He asked him what he had in mind. He started forth several times and now is telling him what he had in mind. Then he interrupts and gets back to a fee. It doesn't mean he has to have in mind what counsel thinks he

(Testimony of C. C. Crozier.)

should have in mind. If he asked him what he had in mind, he is entitled to answer.

Mr. Rathbun. I'm entitled to have an answer to what I'm asking, not having him wander about in a speech about 4,400 acres that I'm not asking about.

Mr. Vitousek: If the Court please, I suggest that the question be answered. If they want to withdraw it, all right.

Mr. Rathbun: I'm not withdrawing it.

Mr. Vitousek: May we have an understanding that when I'm addressing the Court I'm addressing the Court? I'd like to address the Court in an orderly procedure, but it's making it very difficult. I'm objecting to counsel interrupting when the witness is attempting to answer a question that's been put. That's the basis of my objection. Now, if my understanding of that question is wrong—and I will admit [1639] that we are occasionally wrong in what we understand—I think the question should be read to clear it up. That's my statement.

The Court: We have this difficulty all the time. When you don't get an answer that you expect, you start interrupting with another question.

Mr. Rathbun: Well, if the Court will tell me how to pin this man down like the other witness without doing that, I'll be greatly obliged. When he talks to me and I ask him a simple question about how much fee they own, he starts talking about 4,400 acres. I can't pin him down on what I asked.

(Testimony of C. C. Crozier.)

The Court: You can either move to strike the answer or ask it over again.

Mr. Rathbun: Well, I'll just let him answer and put in all he wants to say.

The Court: What is the last question?

(The reporter read back several questions and answers.)

The Court: It is rather difficult to tell what the question was, in view of the cross conversation. Supposing you reframe the question.

Mr. Rathbun: I want him to tell me what fee this company had that he considered when he gave the opinion of its value the day before the takings in these cases, outside of the mill.

A. I have no idea as I sit here, Mr. Rathbun. I have that filed somewhere. [1640]

Q. Have you any idea of what you had in mind when you arrived at your opinion of the value of these properties, including the fee owned by the company?

A. Specifically?

Q. The day before the takings in these cases.

A. Specifically?

Q. Yes, specifically. A. No.

Q. You don't deal with things like this without being specific, do you, Mr. Crozier, in your experience as an appraiser?

A. No, but you have, by reason of inspection and review and knowledge of the facts that you have covered, you have certain factual information that is balanced in in the end with your opinion, and during all these years leading up to

(Testimony of C. C. Crozier.)

this, and I now am in court and find myself confined to two or three dates—June 21, 1944. In my study the specific date wasn't an actual factor except that it is a before and after on that date now.

Q. Are you through? A. Yes.

Q. Now, will you tell me what factual evidence you had as to the value of the number of acres of fee that they owned outside of the mill property? You say you had certain factual matters. That's the one I'm asking about. [1641]

A. You want the exact acreage?

Q. I want to know what you had in your mind in acreage when you made your opinion.

A. I'll have to get it for you.

Mr. Vitousek: Now, I want to interpose another objection. I followed those questions closely. The first one was value of fee land; the next one, I want to know what you had in mind of acreage. Now, there are two different subjects there. If he's talking about value, let's stay away on value. If he wants acreage, then acreage. The witness has testified repeatedly that he did have these figures but they are in his office. If he wants them, why he can get them. But I don't think it is right to ask the witness on value and then turn right around and ask on fee without giving him a chance to answer the question. That's the basis of my objection.

The Court: I think it is apparent that he is asking him in reaching this opinion as to value before and after what specific fee holdings of the

(Testimony of C. C. Crozier.)

plantation did he have specifically in mind. That's quite clear to me.

Mr. Rathbun: If this gentleman wants to go and get some more papers, I have no objection.

The Court: I think that was the last statement that he made. Do you want to go to your office to get some papers?

The Witness: What I am trying to bring out is—

The Court: You had better not. [1642]

Q. You want to get some more papers before you go further?

A. If you are going to cross-examine me on the specific items of what they had on or about June 21, 1944, in the specific area in the mill site and other items owned in fee, I'll have to get that.

Q. I'm going to ask you every question that I think I should ask to see what you based your opinion on. That might be a lot of questions.

A. Well, I'll endeavor to answer all questions but I'd like to have the correct answers.

Q. I'd like to have the correct answers, too.

The Court: The only question is, do you want to go get some papers that are in your office?

The Witness: Well, if Mr. Rathbun wants the answer of the fee land in the mill site and the fee land in other areas owned by the plantation, I'll have to get that from my office.

The Court: That's what the question calls for, so I will take a recess and let you get your papers.

(A short recess was taken at 9:45 a.m.)

(Testimony of C. C. Crozier.)

After Recess

The Court: You may proceed.

Mr. Rathbun: There is a question pending.

(The reporter read the question referred to.)

The Court: Do you have the question in mind?

The Witness: Yes.

The Court: You may answer it.

A. The fee ownership is 387.905 acres.

The Court: Once again.

A. 387.905 acres of fee land in January of 1944, January 1, 1944.

Q. Did you get that from some list that you have in your hand? A. Yes, I did.

Q. What is that document you have in your hand?

A. That's the real property schedule of the Honolulu Plantation for the year 1944.

Q. Filed in your office as an official document?

A. Compiled in our office as an official document and public document.

Q. Where were those lands located?

A. They consist of 43 parcels of land scattered throughout the plantation.

Q. What valuation did you give those in arriving at your opinion?

A. Specifically, none.

Q. You didn't even consider their value?

A. I knew that they owned this much acreage, had a certain tax value, or could command a certain value. Specifically, the 43 parcels were not

(Testimony of C. C. Crozier.)

valued as to the market on [1644] January 21, 1944.

Q. They had a value, didn't they?

A. They did.

Q. A specific value at that time?

A. They did.

Q. And you didn't consider that?

A. I didn't compute it.

Q. Therefore you didn't consider it on its real value?

A. You mean I didn't set it up as to its market value?

Q. You didn't have it in your mind and base a dollar of your valuation on it, that's what I mean.

A. Well, I knew the plantation on January 21, 1944, coming down to the area in cane and in acquiring it you'd have to account for 387 odd acres of fee land.

Q. In arriving at your opinion of the value of this property, including that land before the take in these cases, you didn't consider the actual value of that fee land? A. I did not.

Q. Now, you said in the direct examination in substance that the mill of the Honolulu Plantation Company was not as valuable after the take as before, did you not? A. That's correct.

Q. What was the value of the mill before the take? A. Specifically?

Q. Yes, specifically. [1645]

A. I have no specific item for that.

Q. And you didn't figure? A. I did not.

(Testimony of C. C. Crozier.)

Q. How did you arrive at the conclusion that it was of less value after than it was before?

A. Well, you had a mill—

Q. If you didn't know that.

A. —well, if you had a mill that would take care of 4,400 acres of cane, of which approximately fifty or sixty percent would be harvested, forty percent would be in the growing crop for the following year, producing 25,000 tons of sugar, the following day you had less area, producing considerably less tons of sugar by reason of the taking of the sugar acreage, your over-all picture is changed.

Q. Would that affect at all the intrinsic value of the machinery in that mill?

A. By "intrinsic value" you mean what?

Q. Don't you know what intrinsic value means?

A. Not specifically.

Q. Not specifically?

A. There's a number of definitions.

Q. Well, answer according to your definition what intrinsic means.

A. Well, I presume intrinsic means, means physical replacement. [1646]

Q. All right. Answer it on that basis.

A. It would cost you—you could determine that it would have a specific cost.

Q. What did you have in mind in regard to that in arriving at your opinion in this case??

A. I had nothing in mind regarding—

Q. You didn't figure its real intrinsic value?

(Testimony of C. C. Crozier.)

A. I did not.

Q. Now, will you answer my question? Would the fact that they had less acreage affect the intrinsic value of that mill property?

A. It would not.

Q. By one cent? A. It would not.

Q. Now, having answered the question as you did, that it was less valuable afterwards than it was before, what was the actual value of it afterwards, the mill property?

A. I have no specific item for the mill property.

Q. You didn't figure? A. I did not.

Q. You didn't sit down and take the rollers and the crushers and the vacuum tanks and the centrifugals and— A. I did not.

Q. —and add them up and arrive at any value on them? A. I did not. [1647]

Q. You stated also on direct examination that the irrigation system was not as valuable after the taking as before? A. That's correct.

Q. Now, just what did you mean by that in items, the irrigation system?

A. Well, I do know from my experience and study that certain ditches had been put in to serve certain fields and certain areas, we will say prior to the taking, with the idea of carrying on the enterprise, only to find that certain areas had been taken away, and had they known at that time they would have had less ditches both in construction and cost and kind of ditch. But they now find

(Testimony of C. C. Crozier.)

Q. What were the items that constitute the irrigation system that you had in mind when you made that answer?

A. Well, I think the maps show the different ditches.

Q. I don't know about maps. What did you have in mind?

A. Specifically, none.

Q. Specifically? All of my questions are specifically.

A. None.

Q. Do you know how many miles of ditch there was in this plantation property previous to the takings in these cases?

A. I did at one time know that, yes. [1648]

Q. Did you know when you made up your mind as to your opinion of value in this case that you have testified to?

A. I did not specifically.

Q. You didn't have any specific figure in mind?

A. No, sir.

Q. Did you know how much of it was a concrete ditch and how many miles of that there were, or how many feet?

A. Prior to the taking?

Q. Yes.

A. I don't know the specific mileage but I did know it at one time.

Q. Well, did you know when you made up your mind on this case as to the opinion of value?

A. I did not.

Q. And you didn't try to figure?

A. I did not.

Q. Were there any flumes in this irrigation sys-

(Testimony of C. C. Crozier.)

tem that you meant to say was of less value afterwards than it was before?

A. I think the flume system of the Honolulu Plantation is just about obsolete as I recollect. At one time they did have a considerable investment in flumes but their fluming procedures decreased and became somewhat obsolete.

Q. You would say, then, when you arrived at your opinion of value in this case that you assumed that on the property of the plantation company that they had before these takings [1649] in these cases no flumes of any value?

A. Yes, there were some certain flume stations on the plantation, as I recollect.

Q. Where were they?

A. I believe they were west or north of the mill.

Q. Whereabouts west and north of the mill? On what field? Or describe them specifically for us.

A. Well, I'd have to get a map.

Q. You can get anything you please.

A. Has there been a map introduced in evidence as to these items such as the ditches and reservoirs?

Q. You're testifying; I'm not. There are the exhibits. You can look at them.

The Court: Do you want to see the exhibits?

A. I don't know which one among the exhibits would have a flume.

Q. Well, you can't tell unless you look at them? If you want to look at them, here they are.

(Testimony of C. C. Crozier.)

A. Could I see the annual report of the Honolulu Plantation of 1943?

Mr. Vitousek: What year?

The Witness: 1943. (Clerk hands a document in evidence to the witness.)

A. As I stated, that at the early stages, as I recollect from my field experience, Honolulu Plantation had certain [1650] flume systems which were being done away with, and there was a flume station near the railroad track, I should imagine half a mile west and north of the mill. But I find no item of flumes on their books or any notation of areas that are attributable for flume right areas.

Q. Are you through now with your answer?

A. Yes.

Q. Regardless of their books, what did you have in mind as to the miles or feet of flume that was on this property that you said was worth less in the irrigation system after the taking than it was before?

A. Specifically, none.

Q. It might have all been worn out, for all you know, then?

A. It might have been, and obsolete.

Q. It might have been obsolete?

A. That's correct.

Q. Have no value whatever?

A. As far as the enterprise, yes.

Q. On the other hand, it might have had a distinct value and a distinct life in years left, is that right?

(Testimony of C. C. Crozier.)

A. Physically, materially it might have had a salvage value or other use value.

Q. It might have had something that somebody razing it might have given a value to? [1651]

A. Maybe so.

Q. But you didn't look into that?

A. I did not.

Q. And still you say it was worth less after the take than it was before?

A. If that—yes, that is correct.

Q. You said that the road system—some of which was paved, some semi-paved—was not as valuable after these takings in these cases now on trial as before, did you not? A. I did.

Q. How many miles of road system did you have in mind when you made that statement?

A. Specifically, I don't know. I didn't have any.

Q. You haven't any idea?

A. I did know the mileage of different types of roads.

Q. Did you when you testified in your opinion in this case and when you made up your mind as to the opinion that you gave in this case?

A. I did not.

Q. You didn't try to ascertain how much road there was in miles or feet on this property?

A. I did not.

Q. People might differ on that, would they not, on the valuation of those roads?

A. That's correct. [1652]

(Testimony of C. C. Crozier.)

Q. If they could be valued separately?

A. Undoubtedly so.

Q. So you can't tell us so that we can cross-examine you on what your idea of the value of the roads was when you made up your mind on the value of this case when you testified as to value?

A. That's correct.

Q. Now, on direct examination you specified the larger machinery in that mill on this property, did you not?

A. I think it was mentioned, the items that constitute the machinery in the mill.

Q. Yes. You mentioned rollers, didn't you?

A. I did.

Q. Now, what kind of a piece of machinery is that roller? Will you describe it in general?

A. Well, it is a series of steel construction, a series of rollers where the cane comes in, two rollers on the bottom meshed one way, and one roll on top meshed another way; and a series of rollers with the engine bed and the pump to operate that part of it which is known as the mill itself.

Q. A big piece of machinery, isn't it?

A. A big piece of machinery.

Q. Cost a lot of money at some time when they bought it, didn't it? A. Yes. [1653]

Q. Do you know how much?

A. And it cost a lot more today.

Q. Do you know how much it cost?

A. I should imagine that all of five hundred thousand dollars, with the mill.

(Testimony of C. C. Crozier.)

Q. Did you have an examination made of that roller or roller system? A. I did not.

Q. To ascertain what the depreciated value was?

A. I did not.

Q. The day before and the day after the takings involved in these cases here? A. I did not.

Q. You haven't any idea?

A. I have this idea, that I talked to the mill engineer at various times prior to this consolidated date relative to his mill.

Q. Yes?

A. And after talking with him I decided that he had a pretty good mill.

Q. Fine. Pretty good mill? Pretty good roller?

A. That's correct.

Q. What did you value it at?

A. Put no value on it.

Q. You didn't have any idea of its actual value when [1654] you made up your mind as to the values you testified to here?

A. Specifically, no.

Q. Will you describe the centrifugal that you mentioned?

A. Well, the centrifugals are machinery that the molasses comes down after it is cooked to its right constituency and goes through the centrifugal for the separation of the molasses from the sugar. The molasses is at a certain temperature. They are put in these centrifugals, which are about three, four feet in diameter and possibly three feet in depth, with a shaft coming down to them holding

(Testimony of C. C. Crozier.)

the bowl. It is a bowl where the molasses in the right temperature is put into it. The centrifugals are spun at a high revolution for a period while crystals of sugar separate from the molasses.

Now, those particular items of machinery or whatever they are, centrifugals, cost a lot of money, didn't they at some time?

A. Yes, they are expensive equipment.

Q. And they depreciate, don't they?

A. Physically, yes.

Q. Physically, yes, from use, don't they?

A. In good bookkeeping you'd depreciate them.

Q. I didn't ask you about bookkeeping. They depreciate physically, don't they, from use?

A. Yes, everything depreciates physically.

Q. They do, don't they? [1655]

A. They do.

Q. Did you try to ascertain how much they had depreciated? A. I did not.

Q. Did you try to ascertain how much they cost?

A. Well, at one time we did go into that.

Q. What did you have in mind when you arrived at your opinion?

A. Specifically, no items of value as far as the centrifugals.

Q. What about the crushers? Will you describe them? A. Well, the crushers are—

Q. That's one of the things you named, isn't it?

A. Well, the crushers are going through a period of experimental stage. The various mills were

(Testimony of C. C. Crozier.)

started out when they went from hand harvesting to mechanical harvesting, and considerable money and experimentation has been done on the so-called conveyors. The crushers, specifically, are the mill itself that crushes the cane through the various rollers.

Q. Is that a large piece of machinery?

A. Not too large. It's out in the open.

Q. Cost considerable money some time?

A. Yes, they have cost considerable money.

Q. It depreciates, doesn't it? A. It does.

Q. Do you know how much it had depreciated at the time you gave your opinion in this case?

A. I do not.

Q. And at the time you made up your mind as to the values you testified to here?

A. Specifically, no.

Q. You didn't try to ascertain it?

A. Of my general knowledge of them—no.

Q. Your general knowledge didn't tell you what it was worth intrinsically?

A. Specifically, no.

Q. To get back to the next big items that you testified to, what other big items of machinery are in that mill?

A. Well, you have the vacuum tanks, the cookers.

Q. I asked you about that, didn't I?

A. No, you asked me about the mill and the centrifugals.

Q. All right, the vacuum tanks.

(Testimony of C. C. Crozier.)

A. After the juices have come through and have been treated by line and through the mud pressers and the like, they go into this vacuum tank where considerable cooking process takes place.

Q. Are those large tanks?

A. They are. They are very large tanks, big supports. They are generally at a higher elevation in the mill, in which the juices are pumped up to take the molasses by gravity. [1657]

Q. At some time or other they cost considerable money, didn't they? A. They did.

Q. Did you try to ascertain the intrinsic value of those and have any figure in mind as to the intrinsic value at the time you made up your mind as to the values testified to here?

A. I did not.

Q. Did you try to ascertain how much they had depreciated through actual use? A. I did not.

Q. What other big item of machinery is in that mill or was in it at the time you made your valuation?

A. In addition to the main units of a mill there are auxiliary units.

Q. Well, the big items?

A. Well, we have covered practically all of the big items, taking the cane in on the conveyors, we have put it through the mill; we gathered up our juice; we have cooked the juice; and we have taken it on down to the centrifugals.

Q. Well, you didn't attempt to ascertain and you didn't have in mind, therefore, any specific

(Testimony of C. C. Crozier.)

value on any of the other items in that mill besides the ones that you have just specifically described when you made up your mind as to the value that you have testified to here? [1658]

A. Other than my knowledge that they had a mill with its component parts to carry on the mill and produce sugar; and then one thing further, in the Honolulu Plantation you have got the refinery.

Q. Well, having that knowledge didn't give you any information on its intrinsic value, did it, the knowledge that you mentioned?

A. That's correct.

Q. You didn't have any knowledge on it when you made up your opinion on it?

A. Specific items, no.

Q. Either before or after? A. Correct.

Q. Now, take the railroad. How many locomotives did they have the day before the takings involved in these cases being tried?

A. The exact number I do not know.

Q. How many cars did they have?

A. I do not know.

Q. Did you try to find out?

A. Specifically, no.

Q. What was the value of the railroad system that you had in mind when you arrived at your opinion of value to which you have testified here?

A. Specifically, no item of amount. [1659]

Q. Railroad rolling stock depreciates, too, doesn't it? A. It does.

(Testimony of C. C. Crozier.)

Q. It has pretty hard use in a cane field, doesn't it?

A. Yes, but maintaining and upkeep somewhat offsets that depreciation.

Q. Well, they reach a stage where they depreciate instead of upkeep?

A. Well, we have some locomotives on some of the plantations that are going 60 years.

Q. Will you answer my question, please?

A. May I have that again?

(The reporter read the question.)

A. I wouldn't say exactly.

Q. What?

A. I said no in some locomotives.

Q. Some locomotives? How about these locomotives?

A. These locomotives are pretty well maintained.

Q. You'd say there had been no depreciation at all?

A. Oh, certainly.

Q. How much was it?

A. I should imagine there are about—they are about 50 percent efficient.

Q. What do you base that on?

A. Observation and efficiency.

Q. And you are imagining, aren't you? [1660]

A. Estimating.

Q. Did you ever sit down with a pencil and try to figure and take the years of life and their use and everything and figure it out that way?

A. I did not.

(Testimony of C. C. Crozier.)

Q. What other things were there that you had in mind belonging to this plantation besides the mill, the machinery, the roads, the irrigation system and railroads?

A. Well, there are many more items in the plantation.

Q. What are you looking at now in that document you have in your hand, Mr. Crozier?

A. This is what is known as the U. S. Government Appraisal, miscellaneous file in my—

Q. Did you appraise any of these properties involved in this case for the U. S. Government?

A. I did not.

Q. Well, that hasn't anything to do with them, has it?

A. Why, you're asking me for other items in the plantation.

Q. Yes.

A. I just want to refresh my memory.

Q. That's fine. But I'm asking you what you are looking at?

A. This is a file that I had on the various Government appraisals that I made prior to these takings that involved [1661] items of Honolulu Plantation and the Damon land and other land.

Q. Yes. Now, what specific thing are you reading from now?

A. An improvement schedule. You have the pumps—

Q. What is the improvement schedule? Describe the document you are reading from, please?

(Testimony of C. C. Crozier.)

A. Well, it was—

Q. What was that schedule that you mentioned?
Just stick to that one.

A. It was a schedule that we made up.

Q. Who made up?

A. It was made up by Mr. Cox and myself.

Q. Who is Mr. Cox?

A. Mr. Cox is an engineer with Alexander and Baldwin.

Q. The U. S. Government didn't make it up, did they? A. They did not.

Q. All right, you are going to use that to testify to answer my question?

A. I am going to pick the items out of this schedule that constitute part of a plantation enterprise.

Q. The schedule that you just mentioned, is that it, made out by Mr. Cox?

A. No, I am going to pick the items out of this schedule that constitute a sugar plantation enterprise, other than the items that you mentioned.

Q. From the schedule that you just described, made up by you and Mr. Cox?

A. That's correct.

Q. All right.

A. If you don't want that, I'll try to do it from memory.

Q. I don't want you to do anything. I just want an answer to my question.

A. I think you have left out pumps.

Q. Pumps?

(Testimony of C. C. Crozier.)

A. You have left out electrical system. You have left out the domestic water system. You have left out the transformers. You left out the fences around the fields.

Q. All right. Fine. Thank you very much for reminding me. A. You included the roads.

Q. We talked about roads.

A. You left out the culverts.

Q. Yes. Anything else?

A. You left out the hospital. You left out—we haven't covered them—the trucks, automobiles and vehicle equipment. The necessary live stocks is part of the enterprise.

Q. What are you reading from now?

A. I am reading from the annual report of Honolulu Plantation, 1943, and the heading is— [1663]

Q. That's Exhibit 13-T in this case, is it not? That's what it's marked, isn't it?

A. That's correct.

Q. All right. Have you finished?

A. Well, there are quite a number of other items—machine shop equipment, lathes, many other miscellaneous items that are part of a sugar enterprise.

Q. All right. Are you through now?

A. I am.

Q. Is that all? Now, to ascertain what some of these items were that you just specified, it was necessary for you to look at the annual report prepared by the Honolulu Plantation Company, was it not? A. May I have that?

(Testimony of C. C. Crozier.)

(The reporter read the last question.)

A. Well, there are a number that I gave from memory and a number I picked out from this annual report.

Q. You couldn't give them from memory?

A. Yes, I think I said from memory.

Q. Not the ones that you picked out of that, you didn't give from memory? A. No.

Q. Did you have that before you when you made up your mind as to the value that you testified to in this case?

A. I had gone over each of the annual statements of [1664] the corporation.

Q. Did you have that in mind in that connection when you made your opinion as to value that you testified to here? A. Specifically, no.

Q. Now, let's take the pumps. Now, you said I omitted them. You weren't asked as to pumps, whether or not they had a lesser value after the taking than before were you?

A. Specifically, no.

Q. Well, or otherwise by direct examination?

A. Why, as I understand Mr. Vitousek's question, it is an over-all picture.

Q. He didn't ask you specifically about pumps, did he? A. He did not.

Q. Now, do you say that the pumps had a lesser value after the date of the takings involved in these cases here than they did immediately before?

A. As a growing concern value, yes.

Q. How much did you deduct in your approxi-

(Testimony of C. C. Crozier.)

mate million dollar figure of decrease in value for the pumps? A. Specifically, no amount.

Q. How many pumps were there?

A. I have no idea.

Q. Immediately before these takings?

A. I have no idea of the exact—

Q. Where were they located? [1665]

A. At different parts of the plantation.

Q. Whereabouts on the plantation?

A. Scattered at lower levels of the plantation, from one end to the other.

Q. Specifically, what fields were they on, do you know?

A. Well, the pumps, the main pumps are not within the cane fields. Some of the booster pumps are in the location within the cane fields.

Q. What have you got in front of you now?

A. I have here a map which shows the map of Honolulu Plantation showing the water supplies and irrigation system.

Q. Where did you get that map?

A. It's part of the copy, my copy of the petition, as I understand, that was presented to Congress and given to me by Mr. Kay, which I referred to yesterday.

Q. Those are some of the things that you worked with Mr. Courtney on, then, is that right?

A. This document?

Q. Yes. A. Not at all.

Q. The map you have in your hands.

A. No.

(Testimony of C. C. Crozier.)

Q. Not at all? A. Not at all.

Q. What kind of pumps were they? Give me the details [1666] of their construction?

A. Well, there are two kinds of pumps, electric pumps and steam pumps. And they take land from certain—either sumps or wells and either put at the same elevation or boost it and then you have the electric booster pumps.

Q. Where were the electric pumps located?

A. Well, specifically below the—one electric pump that I know specifically that I had something to do with, and that was the electric booster pump, below the Navy hospital site.

Q. What civil case was the land included in these law suits that are tried here was that pump located on?

A. None. It was outside the property, an area above.

Q. How many other electric pumps were there?

A. I don't know the exact number.

Q. Did you know when you made up your mind as to the opinion of value that you testified to in this case? A. I did not.

Q. And you didn't try to find out?

A. Specifically, no, no.

Q. Did you examine the pumps, try to find out the depreciated condition that they were in?

A. I did not.

Q. Immediately before the takings involved in these cases here? [1667] A. I did not.

Q. How do you know, then, that they were of

(Testimony of C. C. Crozier.)

lesser value if you didn't know what they were worth before?

A. Well, there was one specific pump that I referred to and that was the pump that was recently installed to take the water and boost it to the land that they had gone on to, new land that they opened up above the 650 foot contour, which is one of their main ditches, which area is now taken by the Navy Hospital under Civil 452. And at that time the question of damages entered into it, and the method of procedure and the like, and from a physical standpoint here was a pump that was put in at an expense to serve a certain area in addition to the area thereto, only to find out, as I recollect, that the area had been acquired by the Navy hospital, and therefore the pump had an overcapacity. And the question that was brought out was, had the plantation known that this area was taken they would have less capital in that same pump, as they eventually found that they had after the land was taken.

Q. They'd have less capital in that same pump? Just how would that take place?

A. Well, instead of having a \$25,000 pump to water the cane above the pump and on into the area taken, and had they noticed or had they realized that this area was taken for a Navy hospital they would have had a \$12,000 pump in it. But as I see the picture, they have a \$25,000 pump, \$25,000 worth [1668] of pump where economically they should have only twelve.

(Testimony of C. C. Crozier.)

Q. In other words, it's an overcapacity?

A. That's correct.

Q. Did you make your valuation in this case on over capacity?

A. Well, that's one of the factors that you might say are physically present. I feel that it is my opinion that the over capacity is a factor which diminishes what you have left as a growing concern.

Q. The reason it diminishes it is because you've got money in there that you can't make an ample return on, isn't it, with the equipment being in over capacity?

A. Well, ample return comes from your product that you sell.

Q. Yes. And from the earnings, doesn't it?

A. And your product is now limited. Well, it all depends what you term earnings.

Q. What do you term earnings?

A. Well, there's gross earnings and net earnings.

Q. Well, let's talk about net earnings, then.

A. Net earnings before taxes?

Q. Yes. A. As to the stockholders?

Q. Yes.

A. In which case, in my opinion, an item such as that [1669] would have to be written down to an economic figure—why there would be no net earnings to stockholders.

Q. That particular pump, now. Let's stick to this pump that you are talking about. That had

(Testimony of C. C. Crozier.)

the same intrinsic value after all this happened about the Navy taking the land than it did before, didn't it?

A. That is correct. The intrinsic value is so-called replacement value or catalogue value.

Q. It could have been moved out and possibly sold and used some place else?

A. That's correct.

Q. Maybe they could have gotten all they paid for it? A. That's correct.

Q. For all you know?

A. That's correct.

Q. Now, what other pumps were there beside that one? A. There were a number.

Q. Where were the other electric pumps located?

A. Well, I believe there's an electric pump at Halawa valley adjacent to fields—they had a pump in Halawa valley and a pump below the mill.

Q. Any others? Electric pumps I'm talking about.

A. Of course, my recollection is all the pumps had been electrified.

Q. All right. How many were there that you had in mind [1670] when you gave your opinion in this case?

A. And a pump in Kalauao district near field 46; pumping plant in Waimalu valley.

Q. Is that all?

A. Yes. As I said, the pumps and the booster

(Testimony of C. C. Crozier.)

pumps are scattered throughout the plantation, and I have cited some of them.

Q. How many booster pumps that you had in mind when you made this valuation?

A. Specifically?

Q. Yes. A. None.

Q. What's that?

A. Specifically the number?

Q. Yes. A. None.

Q. You didn't know? A. I did not.

Q. Now, the ones that you did know about, what were they worth immediately before the takings involved in this trial?

A. I did not value them specifically.

Q. You didn't attempt to find out?

A. I did not.

Q. What were they worth after the takings involved in [1671] these cases on trial?

A. Specifically, I do not know.

Q. All those things also, pumps and the equipment in connection with them, are subject to depreciation through use, aren't they?

A. They are.

Q. Did you make any attempt to find out anything about that before you formed your opinion of value here? A. I did not.

Q. Now, you said the electric system. Describe that, will you?

A. Well, they have poles and lights and transformers in an electric system, both for the manufacturing end of it and the pumps, and then for

(Testimony of C. C. Crozier.)

the domestic lighting system throughout the plantation.

Q. Well, what do you mean, just poles and wire?

A. Transformers, plugs, switches, all the like that constitute their—

Q. Before I ask you the next question on that subject, all of these things that you have described here as being things that weren't asked about, pumps, electric system, domestic water system, fences, culverts, hospital, autos and trucks and vehicular assets, live stock, machine shop, are all things within the scope of the property that you had in mind when you gave this valuation you testified to, didn't you? [1672]

A. They are items that are within that enterprise value.

Q. They are within the things that you valued? They are included in your valuation that you testified to here?

A. In an over-all picture, yes.

Q. Well, I think it's an over-all picture, too, if you insist on keeping using that. Now, how many miles of wire was there in this electric system?

A. I have no idea.

Q. The day before the takings involved in this case?

A. I have no idea.

Q. You didn't know when you arrived in your opinion?

A. I did not.

Q. It might have been one mile or it might have been fifty?

A. That is correct.

(Testimony of C. C. Crozier.)

Q. And you didn't attempt to ascertain the value of it? A. I did not.

Q. Domestic water. Now, what was there about the domestic water system that you had in mind?

A. Well, as I said, as part of a sugar enterprise there has to be domestic water, supply lines, which is your pipes and valves and elbows and joints and nuts and all the spare parts that constitute a domestic water supply system, faucets and endless number of items.

Q. How much of that pipe line and equipment, faucets [1673] and joints, and so forth, was there that you had in mind when you arrived at your opinion in this case?

A. Specifically, I don't know.

Q. You didn't try to ascertain it?

A. I did not.

Q. What was it worth before the takings involved here? A. Specifically, I have no item.

Q. What was it worth after?

A. Specifically, I do not know.

Q. Fences? A. Same thing.

Q. What did you have in mind on fences?

A. Specifically, no items.

Q. What kind of fences did you have in mind?

A. Well, there are all sorts of plantation fences.

Q. Tell us what they were that you had in mind?

A. Well, some plantations in Honolulu have some concrete posts with wires; others, wood posts with wire, except that I presume as time has gone

(Testimony of C. C. Crozier.)

on they found that the concrete post doesn't burn up when they burn cane fields. And after a cane field has been burnt off, you still have your concrete post standing. But most of the fields are either for cattle or for other purposes fenced. And then there's all the other fences that you find scattered throughout the plantation.

Q. Those fences have any value at the dates you gave [1674] your opinion here, or made up your mind as to the opinion that you testified to?

A. That I specifically set up a value, no.

Q. Did they have a value?

A. Yes, they did.

Q. You don't know what it was?

A. I do not.

Q. How many miles of fences was there that you had in mind when you arrived at your opinion that you testified to? A. I have no idea.

Q. You mentioned culverts. How many culverts were there that you had in mind when you made up your opinion here?

A. The number I do not know.

Q. You haven't any idea?

A. Except that having inspected the plantation, here and there throughout the plantation.

Q. But the number of them wouldn't determine their value?

A. Specifically, intrinsically, yes.

Q. All of these things that you are being asked about now that were on this property are things that had value, didn't they?

(Testimony of C. C. Crozier.)

A. That's correct.

Q. And they are the items that you are giving an opinion on as to value of, aren't they, collectively? [1675]

A. They are part of my final deduction, yes.

Q. Included before and after?

A. Yes, in some cases.

Q. In some cases?

A. In some cases they'd have the same value before and in some cases they'd have the same value after.

Q. Now, which cases are those?

A. You'd have some to start in.

Q. I don't know. You made the statement.

A. Well, your live stock would have the same value before and after, your trucks.

Q. That wouldn't be affected by this overcapacity situation?

A. Yes, your trucks would have the same, and many other items that you'd have to go down and eliminate as you go through after you—

Q. Now, what are the other items that you had in mind when you made that statement?

A. Well, we are getting into a field of many thousand items.

Q. I don't know what you are getting into the field of. You made the statement. I'd like to know what you mean by it.

A. Well, it would be all those items off the plantation that would be so-called movable items.

Q. What are those? [1676]

(Testimony of C. C. Crozier.)

A. Well, that's your live stock, your motor vehicle equipment,—

Q. Yes?

A. —your spare parts for all divisions, I presume.

Q. What do you mean by spare parts?

A. Well, you've got nuts and bolts and wire and globes and extra inventory in your warehouse. You have about 30,000 items, I should imagine.

Q. Thirty thousand?

A. I should imagine a plantation has well on to that number of items and parts.

Q. Well, have you named all that you can specifically name now? A. In general, yes.

Q. Now, those items that you have in mind that you mentioned last, live stock and vehicles and this 30,000, are things that had a value which was the same after these takings in these cases as they were before, is that it?

A. That would be my opinion.

Q. And they are part of the assets included within the figure that you gave as to value, are they not? A. That's correct.

Q. How much was the value of those things that you say didn't decrease any?

A. I haven't any idea specifically. [1677]

Q. When you arrived at your opinion you had no idea? A. That's correct.

Q. You didn't make any deduction for those?

A. I did not.

(A short recess was taken at 10:55 a.m.)

(Testimony of C. C. Crozier.)

After Recess

By Mr. Rathbun:

Q. Now, you mentioned the hospital. Where is that hospital located, in the Village of Aiea?

A. No, it is not. It's in the land of Kalauao, which is west of the village.

Q. Adjoining it? A. Yes, adjoining it.

Q. Is that a completely equipped hospital?

A. Yes, it is a new hospital.

Q. All owned by the Honolulu Plantation Company? A. Yes.

Q. You know that, do you?

A. I believe so.

Q. Well, do you know it? A. Yes.

Q. How do you know it?

A. I understand they own the hospital and the buildings and the equipment.

Q. Well, where did you understand it from?

A. Well, I do know that the building is owned and the land is owned by the hospital and the improvement and equipment is hospital property, I believe.

Q. Well, do you know?

A. I would say, yes.

Q. Well, from what, what information?

A. I don't know whether I ever asked anybody specifically.

Q. You just assumed it? A. Yes.

Q. In giving your opinion? A. Yes.

Q. How many beds in the hospital?

A. Specific number I do not know.

(Testimony of C. C. Crozier.)

Q. You never tried to find out?

A. I did know at one time.

Q. Well, did you have in mind any specific number of beds? A. No, I did not.

Q. When you arrived at your opinion in this case? A. I did not.

Q. How about the equipment in the hospital, technical equipment?

A. Specifically, no amount given.

Q. You made no investigation of that?

A. Specifically, no. [1679]

Q. And you didn't have anything in mind as to the value of it when you arrived at your opinion in this case? A. Specifically, no.

Q. Was that hospital worth less or more after the takings involved in these cases?

A. Well, it would be my opinion that the hospital had an overcapacity.

Q. Had what?

A. It had an overcapacity after the taking.

Q. Just explain what you mean by that.

A. Well, a hospital as part of the growing concern for a 4,400 acres over-all plantation, and you find that with 4,400 acres you have a certain amount of hospitalization, and you now find yourself with 3,300 acres, which is less employees, and you'd have less hospital.

Q. And you think just because of the 1,087 less acres that that meant necessarily that there would be less patients and less use for the hospital?

A. That's correct.

(Testimony of C. C. Crozier.)

Q. Supposing they had an epidemic?

A. Well, that would be conjectural, would it not, in any buyer's and seller's mind that would buy this hospital with an overcapacity, and it is too big for the now enterprise that I now have, and I'll take a chance that maybe next year I'll have an epidemic and make a fortune out of the hospital? [1680]

Q. Supposing that prospective buyer was you, looking at it from that standpoint, how many more people would he say it was equipped to take care of than it was equipped to take care of after these takings in these cases?

A. I should imagine, in view of the fact that my general premise is 20 percent, that the overcapacity and over-all picture is 20 percent.

Q. Based on what?

A. On my over-all picture.

Q. Well, never mind your over-all picture. Specifically, what do you base that 20 percent less on?

A. Specifically, no specific items.

Q. How many patients were there in there the day before the takings in these cases?

A. I haven't any idea.

Q. How many beds did they need to take care of the employees of the plantation before the takings in these cases? A. I haven't any idea.

Q. You did not try to find out?

A. I did not.

Q. And still you attempt to testify that it would be lower in value because it was an overcapacity?

(Testimony of C. C. Crozier.)

A. I do.

Q. The intrinsic value of that hospital didn't change one penny because of the takings in these cases? [1681]

A. It did not.

Q. Do you know how much the hospital cost?

A. I do not.

Q. Did you know when you arrived at your opinion?

A. I did not.

Q. How much would you say it was worth after the takings in these cases?

A. Specifically, I have no idea.

Q. In dollars and cents how much less?

A. In an over-all picture I should imagine 20 percent less.

Q. In dollars and cents, I asked you.

A. No, I have no idea in dollars and cents.

Q. You never tried to figure?

A. I did not.

Q. Now, autos and trucks you'd say would have about the same value before as after?

A. Yes, it would be my opinion that the trucking items of the plantation would have the same value before as after.

Q. Wouldn't lesser acreage have the same effect upon the autos that it has on these other items that you testified about in that they might have too many autos and vehicles?

A. Yes, but there X dollars value could be realized before and after, the same X dollars value.

Q. Don't you think fences could be the same thing?

(Testimony of C. C. Crozier.)

A. They might not, for the simple reason you cut the fence at the line of taking; then you have to put an additional fence in around it.

Q. Where did you have that situation?

A. Specifically, I can't recollect any specific—

Q. You're just talking generally again?

A. I'm talking generally, yes.

Q. Machine shop. What were the contents of that machine shop that you had in mind?

A. Well, the machine shop speaks for itself. That has lathes.

Q. There's all kinds of machine shops.

A. Motors. Well, a machine shops, that's part of a sugar plantation enterprise.

Q. All right. How many lathes did they have?

A. Specifically, I have no idea.

Q. You didn't try to find out?

A. I did not.

Q. Therefore, you couldn't value them, could you? A. That's correct.

Q. What else did they have in them besides lathes? A. Well, they had motors.

Q. How many motors? A. I have no idea.

Q. You couldn't value them without knowing, could you? A. That's correct.

Q. What else did they have?

A. They had benches, lockers, other items in the machine shop.

Q. Well, what other items? Let's not be general; let's be specific, that you had in mind?

(Testimony of C. C. Crozier.)

A. Well, offhand, Mr. Rathbun, I can't enumerate them.

Q. Could you enumerate them when you arrived at your opinion in this case? A. No.

Q. You don't know whether they have got 25 motors or 2? A. I do not.

Q. Do you know the size and square feet of that machine shop? A. Specifically, no.

Q. And you didn't when you arrived at your opinion in this case? A. That's correct.

Q. What would you say the value of the building was before the takings in this case?

A. I wouldn't—I couldn't state specifically.

Q. You couldn't state it because you don't know the dimensions, is that right?

A. That's correct, and many other factors that go to the [1684] value of a machine shop.

Q. Which you didn't know also?

A. That's correct.

Q. Now, have you covered the things that you were asked about on direct, namely, the mill, the irrigation system, the road system, the pumps, the electric system, domestic water system, the fences, the culverts, the hospital, the autos, trucks and other vehicles, the railroads, the live stock, and the machine shop; is that everything that's included within the property that you gave your opinion of value of in this case?

A. I don't remember those items specifically coming out on direct examination.

Q. I didn't say they came out on direct exami-

(Testimony of C. C. Crozier.)

nation, but three that I gave you came out on direct examination. Whether they came out on direct examination or not, is that all of the items that you had in mind which were included within the property valued by you in your opinion in this case?

A. No, there must have been other items.

Q. Well, what were they?

A. In the over-all picture.

Q. What were they?

A. Specifically, I couldn't enumerate them.

Q. Can you think of another item besides those that I specified? [1685]

A. I can't recollect specifically any item at this time.

Q. Then those items are the items that you had in mind, and all of them which you had in mind when you arrived at your opinion that you testified to in this case? A. In the over-all, yes.

Q. The only items that had any value in your opinion? A. What items?

Q. The ones that I specified.

A. No, there must have been other items.

Q. I didn't mention land. Including their fee simple land? A. That's correct.

Q. Now, that's everything, is it, everything that had any value, the day before the takings in these cases?

A. At this time I can't recollect any other major specific items.

Q. Well, you are the one that valued them. Now, it's up to you.

(Testimony of C. C. Crozier.)

A. That's correct. I did not value the specific items, Mr. Rathbun.

Q. You valued the over-all property, including those?

A. Those were all items that were in my over-all picture.

Q. Yes. All right. Please answer me if that's all of them that had any value, that you had in mind, of course?

A. Well, I had the over-all picture in mind.

Q. I know you have. But answer my question, please?

A. Well, in my over-all picture I didn't have an itemized list of all the specific items and the before and after value.

Q. Will you please answer my last question?

A. May I have it?

(The reporter read the question referred to.)

A. I believe so, Mr. Rathbun.

Q. All right. Any of those items that you have just given moveables?

A. Yes, a number of moveables.

Q. Which ones?

A. Well, some of the pumps, electric equipment.

Q. Which ones of the pumps? How many of them? A. I have no idea specifically.

Q. All right. What else?

A. The electric equipment, domestic water supply, hospital.

Q. Anything else?

A. Many other items that I have enumerated.

(Testimony of C. C. Crozier.)

Q. Well, what are they?

A. Some of the fences, some of the culverts, pole lines.

Q. Anything else?

A. I'm not sure whether they are items that I have enumerated or not. [1687]

Q. Is that all that you can enumerate?

A. Yes, at this time.

Q. How about automobiles, vehicles, live stock?

A. They should be included.

Q. Trucks? A. They should be included.

Q. Now, did you have those things in mind as being among the property of this company when you gave your valuation or your opinion in this case? A. I did.

Q. These moveables? A. I did.

Q. Can you give us a value on the moveables the day before the taking in these cases?

A. Specifically, no.

Q. Can you give the value of them afterwards?

A. Specifically, no.

Q. Now, will you please tell us how you arrived at this thousand dollars an acre in which you multiplied in effect the 1,087 acres taken in these cases?

A. Well, after my experience over many years in talking to various individuals, having been in this plantation valuation picture—

The Court: Speak louder, please.

A. —having been in this plantation value picture, having [1688] travelled in plantations, and by reason of my position since 1932 to date deeply

(Testimony of C. C. Crozier.)

involved in the value of plantations, having somewhat followed the liquidation of a number of plantations and the sale of a number of plantations, having gone into the matter of ratio of acres to capital required, or book value shown by the different plantations, my opinion that that figure is somewhere in the neighborhood of a thousand dollars an acre for the so-called leasehold plantation.

Q. Give the items specifically that you made up when you figured out this thousand dollars an acre?

A. Well, we'll start in with fee land. Most of the plantations that are on leasehold have some little fee.

Q. Never mind most of the plantations, please. Confine it to the Honolulu Plantation.

A. All right. Honolulu Plantation had 387 odd acres of fee land.

Q. You told me you didn't value it.

A. Specifically, I didn't value it.

Q. So that enters into your thousand dollars?

A. That's right, part of the thousand dollars.

Q. And you don't know what the value of the 387 acres was, do you? A. I do not.

Q. All right. What else?

A. There's the improvement thereon. [1689]

Q. What improvement?

A. Well, starting with the mill, camps, on the fee land; some of their pumps are on their fee land, some of the fee land that had nothing to do with the enterprise. Then go on to their leasehold,

(Testimony of C. C. Crozier.)

the corporation's investment in their respective leases.

Q. Yes. Anything else?

A. Well, specific items I can't recollect.

Q. All right, now, the improvement. What figure in value of improvement did you have in mind when you sat down and arrived at this thousand dollars an acre?

A. Specifically, none.

Q. The mill?

A. Specifically, none.

Q. You used the mill and its value?

A. That's right.

Q. In arriving at that thousand dollars?

A. That's correct.

Q. And what value did you have in mind for the mill in arriving at the thousand dollars?

A. Well, you are talking about the mill building now?

Q. Well, whatever that you are talking about, the mill building alone, not the machinery.

A. Well, you made your question—it was improvement, was it not? [1690]

Q. You said improvement.

A. You said it.

Q. I'm asking you now about what you said. You said improvement. I'm asking you about the mill. That's the way you said it. What did you mean, if you want to qualify it?

Mr. Vitousek: If the Court please, I think we ought to read the question back, that counsel did ask him about improvements.

The Court: The trouble is that each is asking

(Testimony of C. C. Crozier.)

the other as to whether they mean the same thing by the word "improvement."

Mr. Rathbun: I'm trying to straighten it out.

Mr. Vitousek: If the Court please, I object to the question. It's been gone into for hour after hour that he didn't value specific items. He gave first his over-all value; now he's getting his thousand. Are we going through all that again? We'll go down to the half acre and go through that.

Mr. Rathbun: There hasn't been one syllable of question asked in this case pertaining to the thousand dollars valuation that I have heard. If I did it, I did it unconsciously.

The Court: This is in connection with a different matter. The questions are in order. Instead of going back, I would assume, Mr. Witness, that the questioner meant the mill by improvement, but you meant and told him that you considered the improvement on the fees. Now, with that in mind, can you [1691] answer the question?

A. Well, starting out with the mill building, you'd have a building larger after the takings than economically would warrant you'd have before the taking.

Q. Stop there. What were the dimensions of that mill when you made that?

A. Specifically, I do not know.

Q. And how much less would the dimensions be that you had in mind when you made that answer?

A. I do not know.

Q. In fee? A. I do not know.

(Testimony of C. C. Crozier.)

Q. How can you figure it without knowing that?

A. Except as a general assumption.

Q. Just a general assumption?

A. That's correct.

Q. That's what your whole opinion and testimony is based on, general assumption?

A. That's correct.

Q. Camps, is that one of them you said?

A. No, I didn't say that. The camps are on the leasehold. Yes.

Q. Didn't you say that? A. I did.

Q. How much did you value, what consideration of value [1692] did you have in mind when you arrived at a thousand dollars per acre on camps?

A. Specifically, no amount.

Q. How much on the fee land? I think you answered that you didn't value those.

A. Specifically, no.

Q. How much on the pumps?

A. Specifically, no amount.

Q. How much on these miscellaneous lands?

A. Specifically, no amount.

Q. How much on the leasehold?

A. Specifically, no amount.

Q. How much on the corporate investment in the leases? A. Specifically, no amount.

Q. You haven't any idea whether they had a corporate investment of one dollar or a million dollars in corporate leases?

A. I know they had an investment; the exact amount I do not know.

(Testimony of C. C. Crozier.)

Q. You don't know whether it's a dollar or a million dollars?

A. I know it was more than a dollar.

Q. How much more?

A. I haven't any idea.

Q. How do you know it's more than a dollar, then? [1693]

A. Because I actually saw it myself.

Q. Well, where did you see it?

A. Well, they had—we drove down the road of one of these areas' right of way. The corporation had an investment in the record.

Q. That's one thing you knew about? What else did you know about? A. Specifically?

Q. On the corporate investments?

A. Specifically, I couldn't recollect.

Q. Not another dollar that you can account for when you made up your mind of a thousand dollars an acre, specifically I'm talking about? Production specifically.

A. Overcapacity of the mill, overcapacity of the hospital.

Q. What was the capacity of the mill?

A. Prior to the taking?

Q. Yes.

A. I should imagine around 25,000 tons.

Q. You imagine it from what?

A. Well, from information that I had, I presume.

Q. Well, what information?

A. Well, I did know at one time, it was a 30 or 35 thousand ton mill.

(Testimony of C. C. Crozier.)

Q. Well, what did you know when you made up your mind [1694] to this opinion, when you testified to a thousand dollars an acre in this case?

A. Well, I understand on June 21, 1944, on the 4,400 acres basis, that the mill capacity was around 25,000 tons.

Q. You mean by that, that that's all that that mill could turn out?

A. Oh, no. I guess the mill could be over-capacitated.

Q. Well, what do you mean by capacity?

A. Well, they could run the mill from January 1st to December 31st of the year and run on a 24-hour shift and not make replacement.

Q. Well, was it geared that way so that they could do it that way?

A. They didn't gear it that way. The mill could be physically used that way.

Q. Well, as it was on June 21, 1944?

A. No.

Q. What was the ultimate capacity that could be gotten out of the mill?

A. Specifically, I do not know.

Q. And you didn't try to find out?

A. No.

Q. How do you know it was less after these takings than before?

A. Well, I know by deduction that they'd have less cane [1695] acreage.

Q. What deduction, that you lost a—

A. Well, you've lost a thousand acres of cane,

(Testimony of C. C. Crozier.)

and you have a thousand acres of cane less to put through the mill.

Q. They might buy raw sugar to put through the mill? A. They might.

Q. And they did do that through the years?

A. I understand they did.

Q. You know it, don't you? A. I do.

Q. That affects capacity? They have to have capacity for that, don't they? A. They do.

Q. And that didn't change by these takings, did it? A. Not materially.

Q. Well, in any way?

A. No, it might have gone up or it might have gone up or down one year to the next. It varied. I don't know.

Q. Are you familiar with the leases involved in the cases that are on trial here? A. I am.

Q. Now, you had those in mind when you arrived at your opinion in this case, did you not?

A. I assume that in the before and after that they would continue to enjoy the use of those areas under lease. [1696]

Q. Yes. You had in mind Exhibit 9-B in this case, then, which is a lease from McCandless to the Honolulu Plantation, dated October 20, 1909. did you?

A. Well, I knew that certain McCandless lands were leased to the Honolulu Plantation. The number of the exhibit and the like, I have no idea.

Q. Did you have any specific amount of acres in mind in connection with that lease when—

(Testimony of C. C. Crozier.)

A. Yes.

Q. —when you arrived at your opinion?

A. Yes.

Q. What was it?

A. The Honolulu Plantation has under lease from L. L. McCandless Estate 165.83 acres.

Q. What was the term? What are you reading from?

A. I'm reading from the real property assessment schedule of Honolulu Plantation for the year 1944.

Q. Where did you get the schedule from?

A. From the records of the tax office.

Q. And who furnished them to the tax office?

A. The classifications are made up by the Honolulu Plantation.

Q. The acreage made up by them, isn't it?

A. The classification of the acreage.

Q. The acreage has to appear, then, doesn't it?

A. That's correct.

Q. And you are reading from that something filed by the Honolulu Plantation Company to the tax assessor?

A. And by the McCandless Estate that they had under lease to the Honolulu Plantation.

Q. How long did that lease have to run?

A. As I sit here, I don't know the specific terms.

Q. What was it, what date did you have in mind as to the expiration when you arrived at your opinion in this case?

A. Well, as I understand the L. L. McCandless lease to the Honolulu Plantation is dated October

(Testimony of C. C. Crozier.)

20, 1930—1920—for a term of 30 years from January 1, 1910, with a letter, I believe, of mutual understanding relative to the occupancy on and after the termination.

Q. Now, that is the lease that you had in mind when you made up your opinion in this case?

A. That is one of the areas that would be part of the enterprise in making this deduction that they would enjoy the continued use.

Q. Is that all the McCandless property that you had in mind when you made up your opinion in this case as having been taken away from this company?

A. Well, the McCandless Estate has other lands in the district.

Q. Taken away from them, I said, in these cases. That's [1698] what you are testifying on, isn't it?

A. Well, I believe there was a very small area in one of these cases.

Q. Well, what do you know about it? What did you have in mind when you arrived at your opinion? A. Specifically, nothing.

Q. You don't know the acreage that was taken away from the Honolulu Plantation in the cases on trial here that had been leased to them by the McCandless Estate, is that right?

A. I didn't know.

Q. Did you know when you made up your mind on this opinion?

A. Well, I did know the actual area—

Q. What did you have in mind, then, when you

(Testimony of C. C. Crozier.)

arrived at your opinion in acreage and the terms of the lease? A. Specifically, no detail.

Q. You didn't know, in other words?

A. I, why I do know the area that was taken from the McCandless Estate in one of these suits.

Q. Well, then, tell me what you had in mind when you arrived at your opinion, both the thousand dollars an acre and the million dollars?

A. In the over-all picture; specifically, none.

Q. You can't tell me, is that it?

A. That's correct. [1699]

Q. Do you know of any lease from the McCandless Estate to the Honolulu Plantation Company that expired on August 31, 1944?

A. Specifically, no.

Q. And do you know of an extension of such a lease for five years after that date?

A. Specifically, no.

Q. You didn't know anything about that when you gave your opinion in this case, is that right?

A. Except that I do know in my assumption in the over-all picture that the areas leased from the McCandless Estate as part of the enterprise would still be enjoyed by the enterprise.

Q. Well, now, when you are all through with that, will you answer my question?

A. Specifically, no.

Q. All right. How many acres of land did you have in mind when you arrived at this opinion on the Damon lease, which is in evidence here as Exhibit 9-K?

(Testimony of C. C. Crozier.)

A. In January, 1944, the area leased to Honolulu Plantation by the Damon Estate is 224.431 acres.

Q. How many acres did you have in mind when you arrived at your opinion of value in this case as having been taken away from the Honolulu Plantation Company under that Damon lease?

A. Specifically, I do not know.

Q. You don't know how many acres were taken away?

A. I did know, Mr. Rathbun.

Q. Well, tell me what you had in mind, then?

A. Specifically, I haven't the exact—

Q. When you arrived at your opinion?

A. Specifically, no specific acreage.

Q. And still you are multiplying a thousand dollars an acre by 187 acres, by 1087 acres, the amount that was taken away in this case, to arrive at your opinion of value, is that right?

A. That's part of the picture, yes.

Q. Well, that's the way you did it, is it?

A. Well, in the final summation, that's the deduction, yes.

Q. That's what you testified to, wasn't it?

A. That's correct.

Q. What terms did you assume under that Damon lease, Exhibit 9-K in this case?

A. What term?

Q. Yes.

A. I assumed that it would still continue to enjoy that area under lease.

Q. For how long?

(Testimony of C. C. Crozier.)

A. I have no definite period that they would carry on. [1701] I presume that in my before and after and the enterprise over-all, it would enjoy at least 25 years.

Q. From what date? A. June 21, 1944.

Q. Now, you assume that they would have a 25-year enjoyment of that from June 21, 1944, on the basis of what?

A. As a growing concern in making my deductions on the before and after value.

Q. Did you assume that they had a lease for 25 years from that date?

A. I assumed that they'd enjoy the occupancy of that area as part of their over-all picture.

Q. Did you ever hear of the Damon Estate giving the Honolulu Plantation the right to use any land that they didn't have a lease on in writing?

A. No, there's been considerable conversation relative to the propriety or the lease tenure of between the owners and the plantations.

Q. Now, when you are through with that, will you please answer my question?

A. Specifically, no. I have never seen the document myself.

Q. Why don't you answer those questions that way in the first place? It's a simple answer, yes or no.

A. Why don't you ask me the specific questions? [1702]

Q. Why don't you answer yes or no to it? You did finally.

(Testimony of C. C. Crozier.)

The Court: Proceed.

Mr. Rathbun: This goes to his credibility, your Honor. I have a right to ask him this, I think.

Mr. Vitousek: If the Court please, he has no right to ask such a question, is he credible or not? He is asking questions which, I submit, no one knows what they mean. The witness, from what they have gone on before, assumes what they mean, and he has made his answers.

The Court: Proceed.

By Mr. Rathbun:

Q. Now, will you answer that question, or did you answer it No. I think you did. May I have his answer?

(The reporter read the last answer.)

Q. At the time you made up your mind in this case to the opinion of value that you have testified to, did you know that that lease expired at the end of 1943 by its terms, meaning the lease Exhibit 9-K, dated June 27, 1927?

A. I did know that the actual lease that I saw expired in '43.

Q. Then why did you assume that there would be 25 years of enjoyment on that property thereafter?

A. In my assumption of the before and after, on the over-all picture of the 4,400 acres and the 3,300 acres, that that [1703] take would be an actuality.

Q. What would be an actuality?

A. That they would enjoy the 4,400 acres for at least 25 years.

(Testimony of C. C. Crozier.)

Q. Well, let's get out of the 4,400; let's talk about what I asked you, the Damon lease, Exhibit 9-K.

A. Well, as I understand, June 21, 1944, that they were occupying that area.

Q. Do you know under whose authority they were occupying it? A. I have no idea.

Q. Do you know whether it was the Navy authority after they let them take possession of the land? A. I do not.

Q. You didn't try to find out?

A. I did not.

Q. But you still assumed that the Honolulu Plantation would continue to enjoy the occupancy without knowing those things?

A. On my premise, yes.

Q. When you made up your mind as to the opinion of value in this case that you have testified to, did you know when the U. S. Government went into possession of that property by right of entry or otherwise? A. I do not. [1704]

Q. And you didn't know at the time?

A. Specifically, no.

The Court: It's about time for our next recess.

(A short recess was taken at 12 noon.)

After Recess

By Mr. Rathbun:

Q. Mr. Crozier, in arriving at this opinion of value that you have testified to, did you take into consideration at all the earning record of this com-

(Testimony of C. C. Crozier.)

pany? A. Specifically, no.

Q. Well, generally, then? A. Yes.

Q. In what respects?

A. Well, I realized that the Honolulu Plantation had been a corporation of around five thousand acres of cane, five million dollars capital; in addition to making brown sugar it made white sugar, which changes a little bit of the complexion of comparing sugar company to sugar company. It was, as I observed it, it was efficiently run. It paid its bills, and obligations, and made money. And from time to time, as conditions warranted, distributed to its stockholders a dividend.

Q. Now, you considered that, did you?

A. I knew it and it was in the general picture of my thinking, yes. [1705]

Q. And what effect did it have upon your opinion in this case of value?

A. In the over-all picture, you are reducing that enterprise from one picture to another picture.

Q. Just what do you mean from one picture to another picture? Be specific.

A. In other words, you are picturing the Honolulu Plantation before the taking as an enterprise and going concern; there are certain factors that go to constitute it as a corporation, and in the over-all picture you have the after picture of the same corporation with less acreage, therefore less tonnage.

Q. Are you through? A. Yes.

Q. Therefore lesser earnings?

(Testimony of C. C. Crozier.)

A. Therefore less earnings.

Q. And that's part of what you made your valuation on?

A. That's correct; that's a factor.

Q. In other words, you based your valuation—you have already stated that the physical intrinsic value of none of these properties was changed any by the takings involved here, haven't you?

A. That's correct.

Q. What you mean to say in testifying to this opinion is that, for instance, if this company had three million dollars [1706] necessary to operate this company on the acreage that they had before these takings, and 1087 acres of land were taken away, that they could earn **less money on that capital** that was necessary to operate that company than they could before the takings?

A. Well, of course we all expect capital to earn something.

Q. Well, answer yes or no to that, if you can?

A. I can't.

Q. Why not?

A. It's too involved. There's too many—

Q. What's involved about it?

A. There's too many complicating factors.

Q. Well, what are they?

A. Well, your equation of what you term earnings to capital and all the others.

Q. I didn't say any others.

A. Maybe I can explain it this way. If on June 21, 1944, I was about to buy the corporation, and

(Testimony of C. C. Crozier.)

as I reviewed it and had other assistance in going over the various items as to its efficiency and the like, and with the idea of having 4,400 acres with continued use to operate the corporation, I would have X value.

Q. What is X value?

A. Well, we'll call it four million dollars. [1707]

Q. Let's call it something that we can pin our hat on, will you?

A. I did invest that money and proceeded, and two days later I found that I had not 4,400 acres of cane to carry on my over-all enterprise, but 3,300 acres of cane. I then would have a diminishing in my purchase or diminishing my enterprise of a million dollars. In other words, by my before and after value on an over-all picture.

Q. And your over-all picture, regardless? After the taking you had less earnings on the money that was invested to operate the company, isn't that what you mean?

A. You naturally would have less.

Q. Is that what you mean?

A. Not specifically.

Q. Well, generally, then?

A. Yes, generally.

Q. And it affected your opinion, and you based your opinion partly on that, didn't you?

A. Partly, yes.

Q. The taking of this 1087 acres involved in the cases on trial here didn't change or affect the capital invested to operate that company one dollar.

(Testimony of C. C. Crozier.)

did it? A. It must have.

Q. How did it? Did it take any of it away physically? A. No, physically, no. [1708]

Q. It was right there after they took the property, the same as it was before? Invested in the company? A. That's correct.

Q. If before the takings in this case that company was earning six percent on four million dollars of necessary invested capital, the figure that you used, how much less could they have earned after they took 1087 acres away?

A. Specifically, I have no idea.

Q. Did you have any figure in mind on that?

A. I did not.

Q. When you gave your opinion in this case?

A. I did not.

Q. Don't you think you'd have to base it as you do partly upon earnings?

A. To the ultimate degree I should imagine, yes.

Q. What do you mean by ultimate degree?

A. Well, getting down and taking every item and every factor.

Q. Well, just use your word "over-all", six percent on four million dollars.

A. Well, we all know that the percentage of earnings is decreasing as we get into these economic problems of labor and Government control and what not.

Q. That has nothing to do with these takings, has it?

(Testimony of C. C. Crozier.)

A. I'm talking about the value of your money.

Q. I didn't ask you about value of money.

A. Why, I understood you set up four million odd dollars at six percent.

Q. Because you used four million. Now, again, listen to my question, please. I think it's a fair question. I'm trying to get what you base your opinion on in this case, if it's possible to do it. Assume that you had the necessary working capital. Call it capital investment of four million dollars before this property was taken involved in these cases. Supposing that before the takings it was earning six percent on that, how much less would it earn because of the taking of 1087 acres involved in these cases in your opinion?

A. Well, in my over-all, 20 percent would be less, it would be 20 percent less in dollars.

Q. Well, what would you estimate? What would you say?

A. Well, on that deduction by arithmetic you'd have six percent of four million, which would be \$240,000, less 20 percent.

Q. You just take an arbitrary 20 percent? That would be that they could earn 20 percent less on that invested capital? A. Yes.

Q. That's what you mean to say?

A. By taking deduction, yes.

Q. And you base your opinion on that in this case, don't you? [1710]

A. Partly and indirectly.

Q. Well, partly. You do, don't you?

A. That's correct.

Q. That's one of the items?

A. That's correct.

Q. Making up your opinion?

A. That's correct.

Q. That you have taken into consideration?

A. That's correct.

Q. Therefore, in arriving at your opinion in this case, taking into consideration earnings, you had in mind the net profit for the year of that company, didn't you, in different years?

A. I did not specifically.

Q. Well, did you generally? A. Yes.

Q. What was the net profit of that company for the year ending December 31, 1942, that you had in mind in arriving at your opinion in this case?

Mr. Vitousek: Now, if the Court please, we submit that is an unfair question. The witness, if he has to answer that, is entitled to look at these exhibits the same as counsel is.

Mr. Rathbun: He's telling the witness what I ask for.

Mr. Vitousek: You have no right to do that. He said he didn't take it specifically in consideration, that he took it [1711] into consideration generally, that it was profitable. This was gone into yesterday, if the Court please, if you will look at the notes as I looked in mine. He talked about dividends and he talked about profit yesterday. Now, this is putting it in a different way but it's still the same subject that he was cross-examined on yesterday. He asked about, did he consider

(Testimony of C. C. Crozier.)

they paid dividends, and the answer was yes. Now, if he's going to talk about a specific item, and the witness wants to answer specifically, he does have a right to call for the memo he used when he made up his opinion.

Mr. Rathbun: If this witness was an intelligent witness, if he wants to look at any document before he answers the question, he can ask for it. He doesn't have to have counsel suggest it to him. That's an old, moth-eaten trick.

Mr. Vituosek: I don't like these things about—

Mr. Rathbun: Well, I don't have to withdraw.

Mr. Vitousek: Well, I'm talking to the Court and not to counsel.

The Court: Your objection is overruled and the witness may answer if he can. And he has indicated that he'd like to look at documents, and I'm sure that if need be he can call for a document.

Q. Do you remember the question?

A. May I have it?

(The reporter read the last question.) [1712]

A. Specifically, no amount.

Q. The amount made no difference to you?

A. Specific amount, no.

Q. But still you took earnings into consideration in arriving at your opinion?

A. That's correct.

Q. What earnings did you take into consideration? What year and what amount?

A. Well, it's my recollection that, as I stated, that it was a growing concern, and proper manage-

(Testimony of C. C. Crozier.)

ment and all the other factors, that from time to time, after paying all their bills, they distributed the dividend, and that dividend record, as I recollect, ran around \$150,000 a year.

Q. What year did it run \$150,000 a year?

A. Specifically, I don't know.

Q. We are talking about dividends now?

A. That's correct.

Q. I didn't ask you about that, did I? I asked you about earnings. That's much different than dividend, isn't it?

Mr. Vitousek: If the Court please, I object to counsel arguing with the witness.

Mr. Rathbun: I didn't argue. That's a question.

Mr. Vitousek: Well, I don't think it's a question.

Mr. Rathbun: Well, I do.

The Court: One at a time. There are several questions. [1713]

Mr. Rathbun: But they are all directed at the same thing.

Mr. Vitousek: May I make my statement?

The Court: Yes.

Mr. Vitousek: There are several questions, fast, one right after the other, and the witness has answered the question as put to him. Now he is coming back and saying he didn't ask about dividends. But the question didn't call for the answer. It called for an explanation, and that's what he's giving.

The Court: Well, he's entitled to ask him if he

(Testimony of C. C. Crozier.)

means the same thing by both terms. The question called for net profit and the answer involved the term dividends.

Mr. Rathbun: And I want to eliminate that because I didn't ask him that. I want him to answer my question as I asked him.

The Court: You may ask the question.

Q. Now, my last question was, is there a difference, there is a difference between dividends and earnings, isn't there? A. There is.

Q. You have heard of corporations paying dividends without the net earning to pay them with, haven't you? A. That's correct.

Q. Now, again, did you know the earnings when you took earnings into consideration in forming your opinion of value in this case that you have testified to for the year 1941? [1714]

A. Specifically, no.

Q. Don't you think that it would have been necessary for you to know that before you give it consideration in valuing this property, base it on earnings? A. I knew there were earnings.

Q. You knew what?

A. I knew that the company had earnings.

Q. Well, wouldn't the amount of the earnings make a difference in your valuation if you considered earnings in your opinion?

A. Well, if the earnings had been next to nothing for many years, or they had been exorbitant, they would. But I assume that in—it was my recol-

(Testimony of C. C. Crozier.)

lection that the earnings were commensurate with the enterprise's activity.

Q. Well, what do you mean by commensurate? On what amount and what percentage?

A. If you will let me see a corporation—

Q. You don't need anything to answer that.

Mr. Vitousek: We object to saying that he has to answer and what amount and what percentage on recollection. That was the specific question, the specific amount, and he's entitled to ask for what he did ask for.

The Court: Well, now, you are picking up some of these additional questions. You confuse me. The last real question to the witness was what did he mean by commensurate. [1715]

Mr. Vitousek: May I ask that the record be read back?

(The reporter read the last question)

The Court: There are three questions there. The last one at the time was on "commensurate".

Mr. Vitousek: As I understand the last one, it was on what amount and what percentage. He asked "commensurate" and before the question was answered, he added to it "in what amount and in what percentage?"

Mr. Rathbun: I added that after he answered the other question.

The Court: No. I would like to know, Mr. Rathbun, what is being objected to.

Mr. Rathbun: I'd like to know, too. I'm very much interested.

(Testimony of C. C. Crozier.)

The Court: Well, you keep quiet for a moment and perhaps we can find out.

Mr. Rathbun: All right, I'll sit down.

Mr. Vitousek: In reply to that question the witness asked—

The Court: Which question?

Mr. Vitousek: I mean before he answered the last question which was read. He asked, may I see the corporate exhibit and counsel says No. Now, I'm objecting to the refusal of allowing the witness to see an exhibit when he is asked to answer in what amount and what percentage. I'm not objecting [1716] to the question. I'm objecting to counsel stating he can't see it.

The Court: The witness, as I recall, started to say that he wanted to see a corporate exhibit to use in illustrating his answer. That is the inference he left in my mind, and the witness may see a corporate exhibit if he needs it in relation to his answer.

Mr. Rathbun: May I have the question?

(The reporter read the last question)

The Court: Do you have the question in mind?

The Witness: Yes.

The Court: Do you want to see a corporate exhibit?

The Witness: Yes. I made a statement, as I understand it, that the corporation was a growing concern and had earnings. Now I am to tell Mr. Rathbun the specific figures or the amount of earnings.

(Testimony of C. C. Crozier.)

Q. All right, without looking at some exhibit, you can't tell me? A. I cannot.

Q. And you can't tell me what you had in mind when you made this valuation that you have sworn to here?

A. Except that I do know that it had a dividend record and the dividend as a rule comes out of earnings. And the different times, in studying the Honolulu Plantation, it did have earnings.

Q. All right, now, what exhibit do you want to see? A. Go back to 1939.

Q. Give them all to him, Mr. Clerk.

A. Beginning with the corporation statement, the year ending 1938—

Q. Why do you ask for the one in '38, Mr. Crozier?

A. Well, that's prior to your war period.

Q. How about '39?

A. Well, in '39 we had the first taking of the Makalapa crater and it likely affected the enterprise.

Q. But you are not considering it in this case, are you, the Makalapa crater?

A. No, I'm taking it up to June 21, 1944, and the answer that I have given is as far as my opinion of the value of the diminishing the enterprise.

Q. All right, go ahead now.

A. In the year 1938, Fortieth Annual Report of the Honolulu Plantation Company, ending December 31, 1938, the annual statement shows that

(Testimony of C. C. Crozier.)

in the P and L statement that they carried a loss of \$333,629. And in their 1939, their 41st annual report, that the loss in their P and L statement was \$197,000 odd dollars.

Q. What were the earnings that year, net, before dividends, available for dividends?

A. From that year's activity?

Q. Yes. [1718]

A. On their P and L statement, no earnings.

Q. Was there a dividend paid?

A. There was.

Q. How much?

A. Of \$150,000, I believe.

Q. All right, go ahead. Thirty-nine is next now.

A. I gave '39. 1940—

Q. I thought you said '38 was a loss?

The Court: He did. He has covered two years.

Q. Let's stop there before you go any further. Both of these years you said showed a loss?

A. Yes, under their P and L statement.

Q. Now, did you have these P and L statements, these annual reports from which those P and L statements are taken, marked Exhibit 13-O and 13-P, before you when you arrived at your opinion of value in this case? A. I did not.

Q. The first time you have seen them is today, is it? A. No.

Q. When did you see them before?

A. I have seen them since about 1932.

Q. Did you carry all those figures in your mind up to the time you made up your mind to the

(Testimony of C. C. Crozier.)

opinion that you have testified to in this case, until 1946? A. I certainly did not. [1719]

Q. Then you didn't know what the earnings were when you took earnings into consideration when you made up your mind to the opinion you have testified to? A. Specifically, no.

Mr. Vitousek: Now, if the Court please, the witness asked for certain exhibits, when he was asked a question, and he is entitled to go through all of them without being shut off.

Mr. Rathbun: I have a right to ask questions on the ones he has identified so far. And he can take the rest of them and go through them when I get through.

The Court: Actually he asked for the year '38. He has that. He has them all by reason of Mr. Rathbun suggesting to the Clerk that he give all of them to him. Proceed.

Q. How much of a dividend did they pay in the year 1939, do you know?

A. Would you let me see the corporate exhibit?

Q. Do you know without looking at it?

A. I believe I just said \$150,000.

Q. Well, is that what you had in mind when you gave your opinion in this case?

A. Specifically, no.

Mr. Vitousek: Now, if the Court please, he asked to see the corporate exhibit. I think he is entitled to see it.

The Court: He may. He first asked him whether

(Testimony of C. C. Crozier.)

he could [1720] tell the figure without looking at it.

Mr. Rathbun: Which I have a right to ask, I take it.

The Court: That's right. Proceed.

Mr. Rathbun: Now, what was the answer, please?

(The reporter read the last answer)

Q. If there was a difference in the earnings or the losses in 1938 and '39, you having considered earnings in arriving at your opinion of value, it would make a difference in your opinion of value, wouldn't it, by the difference between the earnings?

A. Yes, if they were gone into specifically and analyzed and all the reasons why. The P and L statement shows a loss at the end of the year for various reasons; charges are taken prior to closing of the books, where in reality they might not be set up, which would show a profit, when taken show a loss.

Q. In the statement of 1938, marked Exhibit 13-O in this case, the loss is shown to be what for that year?

A. According to this P and L statement, on page 16 in 1938 the loss is \$333,629.93, transferred to surplus.

Q. If you didn't have anything before you but that statement you wouldn't give very much value to this company if you based it solely on earnings, would you?

A. On the bottom line figure, no.

(Testimony of C. C. Crozier.)

Q. That's true of 1939 also, isn't it? [1721]

A. Except the 1939—they paid a dividend.

Q. Well, I'm talking about earnings now.

A. They had a loss.

Q. The fact they paid a dividend wouldn't help you any in your mind when they didn't have any earnings to pay it with?

A. You're getting into questions of accounting

Q. Never mind what I'm getting into. I'm asking you.

A. Take the dividend record over a number of years.

Q. What has the dividend record got to do with earnings?

A. Well, you've got to make earnings before you can fundamentally or economically pay a dividend.

Q. You mean you should?

A. You should.

Q. Well, they didn't, did they?

A. Evidently not in those years on those statements.

Q. All right. Now, in this 1939 shows a loss of \$197,559.11, you say? Is that the way you interpreted it? A. That's correct.

Q. The loss in 1938 was \$333,629. If you use earnings in arriving at your opinion of value in this case, there's a difference of some, in excess of a hundred thousand dollars in those two years in their losses, isn't there?

A. That's correct.

(Testimony of C. C. Crozier.)

Q. How much difference would you say that would make in the value that you testified to if you based your opinion on [1722] earnings only?

A. Well, that, if you based your opinion strictly on earnings only, you'd have to go into those—

Q. Please answer on my assumption, please.

A. You'd have to—

The Court: Just a minute. May I have that question?

(The reporter read the last question)

Mr. Vitousek: Now, if the Court please, basing it on earnings only. The witness started to explain; there was a proper explanation. He's making no assumption for these two years.

The Court: I'm not sure what the witness did start to say. May I have that?

(The reporter read the last answer)

A. My value of a million dollars is based on earnings only, and these two P and L statements here showing these losses as affecting my million dollars, you'd have to go into the reasons why these earnings come out in these loss figures.

Q. Well, in arriving at your opinion in this case, if you based it on earnings, it would make a difference if they had different earnings each year, wouldn't it?

A. That would be so, Mr. Rathbun, but anybody assuming that these earnings, these losses are three hundred thousand, one hundred ninety-seven thousand, they might not be reoccurring losses, that that P and L statement could be possibly read-

(Testimony of C. C. Crozier.)

justed to show a different figure completely. [1723]

Q. You wouldn't accept the company's figure on those losses, then?

A. Not item for item, no.

Q. Well, what item don't you accept there in the figure of the loss that they show on those documents?

A. Well, I'd have to make a study of these P and L statements.

Q. Well, you'd better do it.

A. Well, you'd have to start out first with your price of sugar in the future, or except insofar as the following year is concerned.

Q. What does that have to do with it?

A. Well, you are building up a P and L statement, the type of depreciation taken, the method of amortization.

Q. Well, how would you change it?

A. Specifically, I don't know. You'd have to go in and study each one.

Q. Well, I'm asking you.

A. You'd have to go back to the books and the procedures.

Q. Well, you don't accept their books and their conclusions from their books, is that right?

A. Now, Mr. Rathbun, you are having me recite here figures that were taken on these P and L statements.

Q. Surely.

A. Which on the before and after basis would have to be [1724] subject to survey by any indi-

(Testimony of C. C. Crozier.)

vidual who is making these premises strictly on an earning basis.

Q. Well, did you make such a survey when you gave your opinion in this case?

A. No, I told you that my basis is based as a growing concern enterprise that had an economic earning.

Q. You considered earnings but you didn't consider what they were, is that what you are trying to say?

A. Actually, no; according to those statements, no.

Q. If you excluded from this Exhibit 13-P in this case the item of two hundred—which is the annual report for 1939—the conditional payments under the sugar act from the U. S. Department of Agriculture, \$210,182.75, what would the losses have been for that year?

A. It would be that figure plus the one hundred ninety-seven thousand.

Q. It would be \$210,182.75 plus \$197,559.11, is that right? Is that the way you would interpret it?

A. That's correct.

Q. If you had valued this property before and after, and the taking away of the acres that have been taken in this case were the same, at the end of the year 1939, basing it upon earnings what rate per acre would you value, would you use to determine how much was taken away in value from the company by the taking of 1087 acres? [1725]

A. I have no idea.

(Testimony of C. C. Crozier.)

Q. Can you figure it and tell me?

A. No, I cannot.

Q. Why can't you?

A. It would mean another study on the date that you now are setting up as the date of before and after to be computed in the deduction made.

Q. Well, I want to know what effect earnings have. It doesn't matter what year you take, does it?

A. Well, if you go back to 1939 you find that the earnings, the picture is a little better record than the earnings of '38—'39—because in the year 1937 the amount of transferred to net profit of earnings was plus \$407,000.

Q. And how does that affect it if you were valuing it at that time, favorably or unfavorably?

A. Well, I think it supports my contention that in the over-all picture the corporation is a growing concern and has earnings.

Q. But if they earned four hundred thousand dollars in one year and lost one hundred ninety-seven thousand the next, how much less would you value it at in the next year where they lost one hundred ninety-seven thousand over the one where they made four hundred thousand, having in mind 1087 acres as having been taken away from them?

A. That all depends, Mr Rathbun, on the study of the items affecting it. [1726]

Q. You'd have to study that to arrive at that?

A. Strictly on earnings, yes.

Q. And you didn't do that in this case in con-

(Testimony of C. C. Crozier.)

nection with arriving at your opinion you have given here? A. Specifically, no.

Q. Do you think it is proper from the standpoint of the things that you would consider in attempting to arrive at value before and after in this case for this company to use a loss of \$197,559.11, looking at the items that make up this profit and loss statement?

A. On the face of the one year, no.

Q. Why not?

A. Because that item is not a repeating item in your revenues and subsequent years that you are going to put money out and have the earnings on.

Q. How about the conditional payment for that year?

A. Well, conditional payment is another question and recurring item, your compliance payment.

Q. That's sent to the stockholders, is it not, and filed with the public records? Isn't this filed with the public records?

A. Not to my knowledge.

Q. Isn't it required under the laws of the Territory of Hawaii to file an annual report?

A. Yes, a corporation exhibit, not this. [1727]

Q. Similar to that?

A. Similar to that.

Q. This is for the stockholders, as you understand it?

A. This is only for the interpretation of the company's books.

(Testimony of C. C. Crozier.)

Q. It's their own interpretation, isn't it?

A. That's correct.

Q. Are you complaining about that?

A. Not at all, for the purpose that it serves.

Q. They were leading their stockholders to believe that by that report, which is Exhibit 13-P, that they only lost \$197,559.11 in that year, isn't that it, as you read it? A. Yes.

Q. If you add to that the \$210,182.75, they lost that much more, didn't they?

A. That's correct.

Q. And if anybody just looked at that bottom line figure, a stockholder or a prospective buyer of stock, he'd think that that was their net loss that year, wouldn't he?

A. If he went that far, yes; if he made that deduction.

Q. And that would be that item of Agricultural payment? A. That's correct.

Q. Now, I'm showing you Exhibit 13-S and 13-T in this case, the annual reports for 1942 and '43. In the year '42, how do you interpret that as the net profit for that year available for dividends?

A. Now you are getting mixed up on the dividend theory. Are you talking about earnings?

Q. Can you answer the question?

A. You're getting it involved. We have been talking about—

Q. I wouldn't point to anything.

A. In the year 1942, on this annual report under the P and L statement, they transferred as

(Testimony of C. C. Crozier.)

net profit, transferred to surplus \$233,688.37. On the face of that bottom line figure it looks as though they could pay a dividend.

Q. On that amount?

A. Yes, just on that figure. Now, before you pay a dividend, you'd better find out how it's made up.

Q. That's true, but we didn't ask you about that. They made it up, didn't they?

A. But you asked me if they paid a dividend.

Q. I didn't ask you if they paid a dividend at all. I asked you if that was available for dividends. Now, on Exhibit 13-T what would you say the amount shown there, as you interpret it, available for dividends?

A. Their annual report for 1943 shows on their P and L statement transferred to surplus \$190,302.79.

Q. Now, you said you took into consideration earnings in arriving at your value of opinion, opinion of value in this case. Is that the item, those two items that I have just [1729] called to your attention, the last one being \$233,668.37, illustrative of the earnings question that you had in mind when you made your valuation?

A. Specifically, no.

Q. Well, is it typical? A. It is part.

Q. Is it the kind of an item that you are talking about? A. Yes.

Q. If you were valuing this property, then, in the year '42, at the end of '42 and at the end of

(Testimony of C. C. Crozier.)

'43 there would be a difference if you used earnings as the basis in what you'd value it at, wouldn't there, on the face of that? A. There would.

Q. You'd value it less, on lesser earnings?

A. Strictly on those two figures as appearing thereon, yes.

Q. So that that is a variable item, isn't it? That earning proposition. A. It is.

Q. In order to use earnings as a basis for your valuation, you would have to know what the earnings were in the years that you were applying them to, wouldn't you? A. That's correct.

Q. And you didn't know that when you made up your opinion in this case, you said?

A. Specifically, no. [1730]

Q. Now, getting back to the question that started all this Assuming a company had a four million dollar working capital—we'll call it capital investment, as you put it, necessary for operation—and in the year 1942—before I get to that, assume that in the year 1941 they had paid six per cent on the investment. In the year '42 they had this loss that you have testified to as shown by these documents, and in '43 they had the loss that is testified to. How much difference would have been made in the amount that they could have paid to their stockholders?

Mr. Vitousek: May I have that question read?

(The reporter read the last question)

Mr. Rathbun: In percentage.

Mr. Vitousek: If the Court please, we object to

(Testimony of C. C. Crozier.)

that question. It's improper cross-examination in the first place, based on a lot of assumptions. It has nothing to do with the matter. As the witness has testified, he did not specifically take each year's earnings or did not use the earnings specifically, but took the general record. I don't know how anyone could ask a question—how were they paying dividends? He is assuming that they are paying them out of the earnings that year. They might be paying them out of the earnings over a long period of years. It doesn't necessarily follow. It's not an intelligible question.

Mr. Rathbun: It is perfectly intelligible. I'm not assuming, I'm assuming nothing that is not in the question. [1731] I'm asking him to assume that six percent was paid the year before I have a perfect right to do that, to test his knowledge, if your Honor please.

Mr. Vitousek: May we have that question read again now? I don't think it tests his knowledge.

The Court: Will you read that question?

(The reporter read the last question)

Mr. Vitousek: My recollection is, if the Court please, he testified there was a profit in those two years and losses in '38 and '39.

Mr. Rathbun: I'm not saying that. I'm asking to assume what I asked.

Mr. Vitousek: You said—

Mr. Rathbun: It makes no difference what's in there.

(Testimony of C. C. Crozier.)

Mr. Vitousek: You said assuming that the loss has been testified to in the question. He didn't so testify in '42 and '43, reading from the reports. You have them. It shows there was a profit.

The Court: Yes, but he's asking him this question to assume that in fact there was for those two years a loss.

Mr. Vitousek: May I get that again?

(The reporter reread the last question)

The Court: I know from the way you raised your hand there what you had in mind. But the whole question strings together. It starts out with an assumption, and he kept on adding assumed [1732] facts. It's very clear that the whole question is built upon an assumption.

Mr. Rathbun: Certainly.

Mr. Vitousek: If the Court please, we are asking this witness to assume that he testified, which are not facts in the record, or an assumption.

Mr. Rathbun: They don't have to be.

Mr. Vitousek: He can assume and make a clear assumption but he can't assume that there is this loss you testified to when he didn't testify to a loss.

The Court: No, the question doesn't imply that this witness testified to that. I think the question is all right. If the witness can answer it, he may. You may have an exception to the ruling. Do you understand the question?

The Witness: I do not.

(Testimony of C. C. Crozier.)

Q. You do not? What don't you understand about it?

A. Well, in the first place, assuming that when you make your—that your capital was four million dollars when you paid your six percent dividend—

Q. Yes, all right.

A. —that is correct. Then in the year 1942 the loss I testified to—is that the damage, is that the damage or is that the loss transferred on these statements?

Q. Shown by these statements. I used the exact figures.

A. You talked about the loss that I testified to. I'm getting mixed up between what losses.

Q. On these documents.

A. I have just read those. Those are not my losses.

Q. Well, who said they were? We all know they are not yours.

A. Then on the assumption it shows the loss of '42 and '43, what dividend or what percentage, percentage of what, my million dollars?

Q. It would make a difference in the dividend that would be paid, wouldn't it?

A. If they were actual losses, such losses that the company couldn't pay dividends out of other items, or the like, it would make a difference.

Q. It would make a difference in your valuation if you used earnings as a basis, wouldn't it?

A. That's correct.

(Testimony of C. C. Crozier.)

Q. Illustrating it again—the year 1939, the loss for that year is \$197,559.11, as I told you before.

A. That's correct.

Q. And as you know, in 1942 they showed a net profit of \$233,668.37.

A. That's correct.

Q. Now, that difference in those two years, if they were consecutive, would make a big difference in the valuation that you had, that you'd give these properties because of the taking of the 1087 acres, wouldn't it?

A. Specifically on earnings, yes. [1734]

Q. If you used earnings?

A. Yes.

Q. That's the question. And you didn't figure those earnings when you arrived at this?

A. Specifically, no.

Q. And still you took them into consideration in arriving at your value?

A. I did.

Q. And it is part of your opinion?

A. I did.

Q. Now, earnings are variable things, of course, aren't they?

A. They are.

Q. They depend upon many things?

A. Many, many things.

Q. One of the things that they depend on is management, isn't it?

A. That is a factor.

Q. One man might take a plant and make money on it, and another man would take the same plant and lost money on it?

A. All things being equal, yes.

Q. Depending on their position, ability or lack of it?

A. All other things being equal, yes.

(Testimony of C. C. Crozier.)

Q. You'd think that's rather a hazardous thing to base property on, wouldn't you? [1735]

A. Well, it would be a long stretch between management and physical property.

Q. Well, it's so variable. How can you use one figure? A. You can't use one figure.

Q. What did you use when you took earnings into consideration here?

A. Well, as I said before, that in the review of the Honolulu Plantation and my knowledge of it, that it had been well-managed, economically-managed, it had been a growing concern, that over the years it had made money and had a dividend record.

Q. Regardless of how much?

A. Regardless of how much, except within its enterprise set-up.

Q. For the last four years, then, previous to these takings in 1944, if they had lost money every year and it had been different in amount, that would have made no difference to you? You just looked at it as a loss, is that it? It wouldn't have affected your value at all?

A. That is correct.

Q. You made no distinction from year to year?

A. That's correct.

Q. Likewise, if it was profit for the four years and it varied as much as \$500,000 a year in the successive years, that wouldn't make any difference to you in your valuation? [1736]

A. It would if the profit—

(Testimony of C. C. Crozier.)

Q. If you based it on earnings?

A. If the profit was excessive, yes.

Q. If the profit was excessive? A. Yes.

Q. What has that got to do with it?

A. Well' you've got a corporation of four million dollars and it makes a million dollars a year, you're making a lot of money.

Q. That's right, but what has that got to do with it?

A. It's got a lot to do with the value.

Q. Well, what is it?

A. Well, you've got the hazard and stability and many factors that enter into a corpoartion of that nature.

Q. What effect would it have as to the valuation of your property?

A. Well, in the low spots you might have to adjust the low earning period as against the excessive earnings viewed as to discount to get some fair return of earnings on this corporation set-up.

Q. And fair return of earnings is what you base your opinion on as far as earnings are concerned, isn't it? A. That's correct.

Q. You get a lesser return because you've got capital invested that you can't get a proportionate return on with the [1737] lesser acreage, is that what you mean to say in this case?

A. In earnings, yes.

Q. Yes? A. Yes.

Q. And that's a large part of your valuation

(Testimony of C. C. Crozier.)

basis, isn't it? A. It is not.

Q. What percentage of the million dollars of the before and after difference would be ascribable to earnings? A. I have no idea.

Q. Figure it for me. A. I can't.

Q. You can't possibly do it?

A. It is an intangible item.

Mr. Rathbun: That's all, your Honor.

Mr. Vitousek: You mean is that all the cross-examination?

Mr. Rathbun: That's what I said.

Mr. Vitousek: All right. Your Honor, it's one o'clock.

The Court: On Monday, December 30th, this case will continue, and at that time you may examine Mr. Crozier on redirect examination.

(The Court adjourned at 1:00 o'clock, p.m.)

Honolulu, T. H., January 6, 1947

The Clerk: Civil No. 514, United States of America versus 257.654 acres of land, and Civil Nos. 521, 525, 527, 529, 532, 533, 535, 536, 540, 544, 548 and 684, for further trial.

The Court: Are the parties ready?

Mr. Vitousek: Ready, if the Court please.

The Court: Very well, you may resume.

Mr. Vitousek: If the Court please, at the last hearing Mr. Crozier was on the stand and cross-examination had been concluded, and we have no redirect, so we'd like to call Mr. Spalding.

The Court: Your recollection may be correct. I hadn't been conscious of the fact that cross-examination had been terminated. Is that your recollection, Mr. Rathbun?

Mr. Rathbun: It is my understanding.

The Court: All right.

Mr. Rathbun: I have a motion.

The Court: All right.

Mr. Rathbun: We move to strike the testimony of Mr. Crozier, particular testimony, all of the testimony that he gave dealing with an alleged custom to renew leaseholds in the islands. Exhibit 14 was introduced to illustrate the situation. I move to strike the exhibit also. And all of his testimony [1739] relating to Exhibit 15 in the exhibit regarding total area in fee, and in leasehold, with percentages for the Territory, for the Island of Oahu. We also move to strike Exhibit 16 and all testimony in connection with the showing of the holdings of the Honolulu Plantation Company, both leasehold and fee, for the reason that nothing in the evidence from a legal standpoint justifies anything except the cases involved in this trial. We move to strike all of his testimony given in connection with the question as follows: What do the big estates do with these lands to get income from them? And to strike his answer made, and among others, that is, to the effect that as a general rule a lessor renews the leases. I move to strike his entire testimony because he has considered and relied upon certain elements forming his opinion of the value on the before and after

basis which elements are wholly improper under the law, namely, profits, earnings, dividends, book value, capital investment necessary to operate 4,400 acres of enterprise. Further than that, his testimony shows that he didn't know what these profits, earnings, dividends, book value, capital investments were and yet he considered them in his opinion. Also, because he said he considered that all the leases ran to 1965 when it is the Government's contention that the Damon lease terminated on December 31, 1943. Further, on cross-examination he showed an utter lack of familiarity with the leases, made no effort to find out what the conditions and terms of the leases were at [1740] the time he formed his opinion. Further, because he has not made any appraisal of this property previous to the time he testified in this case.

Further, I move to strike all of his testimony for the reason or in regard to severance damage because, although he attempted to value the property on the before and after basis, he didn't value the mill property before or after; he didn't value the machinery before or after; he didn't value the irrigation system before or after; he didn't value the railroad rolling stock before and after; he didn't know the amount of the fee; he didn't value it, he had no idea as to the extent of the fee ownerships.

For the further reason that he admits no basis for a lower valuation for the mill. machinery, irrigation system, flumes, roads, railroads, pumps, electrical system, hospital, machine shop, leaseholds, had no specific information in regard to any of these before he came to his opinion in this case.

Further, although he didn't value or have the necessary information of the value of those things that made up the Honolulu Plantation Company holdings, he was nevertheless able to give in his testimony an over-all valuation.

Further, he says he considered moveables in his valuation on cross-examination. This was directly contrary to his testimony on direct, in which moveables were excluded. As his testimony stands, there is no way of telling how much he based [1741.] on moveables and how much he didn't base on moveables. He didn't, he can't give any specific figures as to moveables.

Further, he admits that although there's 387 acres of fee land, he didn't value it at all, although it is included in his estimate of a thousand dollars an acre which he used as his basis for the reduction in value.

He had no knowledge of the improvements, as to their size, cost or other features about them. Still they are included in his thousand dollars per acre. He doesn't know how large the mill was before or what it should be after. The same as to production. He has no information as to the before and after situation as to production. Yet he says that the mill is too large.

Further, he admitted that although he considered the earnings in reaching his opinion, he didn't then and didn't at the time he testified know what those earnings were that he is supposed to have considered. He admits the term "earnings" is a variable term and to have made a study of it. Relying

on this as a basis, he should have had definite figures before him. Otherwise, he is in no position to give an opinion on anything. The prospective earnings are speculative and cannot be used as a basis for valuation under all of the authorities.

Further, he admits the physical value of all the property is not affected up or down by these takings. Therefore, he obviously bases his opinion upon the decrease of value upon the [1742] lessening of the earnings. This is a mere frustration of profit making, which is a business damage and is not compensable under all of the authorities pertaining to condemnation cases.

The Court: Mr. Vitousek, do you wish to be heard on the motion?

Mr. Vitousek: If the Court please, this motion is rather complicated as it confines several motions in one, the motion as to specific testimony, and a motion as to general testimony. But listening to it, the general purport of it is not properly a motion to strike but an argument as to the weight of the testimony of Mr. Crozier. In the first place, Mr. Crozier was asked many questions and stated he did not recall, for example, the amount of acreage of fee land. He said he didn't recall but could recall from a memorandum. He was given time to go get the memorandum which he had and he gave the exact acreage involved. He stated that he had before him the reports which are in evidence here, the annual reports of the company, that he had before him, the tax returns that he had before him, the general knowledge of the plantation, of

the dividends paid, and the reports themselves show the earnings. He had full information that anyone would need to place their opinion of value of this property. He stated that the values of the personal property, that is, the moveables, the moveable personal property, according to my notes, were the same after as before. [1743] So that is immaterial. He stated that it is true, and we stated in our opening statement to this Court, that in this Territory it has become the custom and business practice which is relied upon to conduct enterprises such as this on leasehold property. It has become such an established practice that it is one that any person—and that's what this comes down to—any person, a willing buyer would certainly take that into consideration. And while it has been shown that in this particular date of the takings there was no general market for property of this kind, nevertheless the Court has stated, and stated repeatedly as the Court has stated in the Baetjer case, that it is proper to take into consideration such elements as a hypothetical willing buyer would take into consideration. And certainly any hypothetical willing purchaser who has been out to purchase the property comprising the enterprise known as the Honolulu Plantation Company would take into consideration the very facts that Mr. Crozier took into consideration. The general business practice, the fact that the property here is closely held, that the landlords are largely estates that hold it to gain their revenue from renting, leasing property, and will continue so to do—the

reports that Mr. Crozier stated he had before him, and the Court will recall that he also stated he had the returns both of the landlord and of the tenant, showing what areas were leased, that the question then was resolved between them, and then he took up the question of classification, and that was [1744] resolved. So the only question that was open was not as to the terms of the lease but the classifications of the lands, the first class or second class cane lands, and so forth. That was then adjusted.

Now, if the Court please, this particular exhibit, Exhibit 13-T, gives a full summary of the terms of these leases. But it is impossible, would be impossible for any witness to go on this stand and from memory give the terms of the leases, the area and acres of the land, the classification or any other such detailed information. That's what Mr. Crozier was asked to do. But when he was permitted to refer to the form and the data that he had before him when he made his study of this plantation, he did give the answers. When he was given permission to go over and get his notes which he used, he came back and to this Court gave detailed figures.

The whole question, if the Court please, the principle of it, is stated in the Baetjer case:

"In short the stricken evidence would indicate a compensable loss only if it means that after the taking the appellants' mills had an uneconomic over-capacity so that they could not be operated by anyone as efficiently and therefore as profitably

as before the taking, this being a matter which a hypothetical willing buyer would consider in determining what he would pay for the property."

Now, if the Court please, in these takings here involved, [1745] as we called the Court's attention to the General Motors case, it is not necessary, nor has there ever been any decision cited by counsel, that we must take each particular item of property of a going concern, mind you, value it separately before and after the taking. In the General Motors case it distinctly gave what is considered property within the meaning of the Constitution of the United States in regard to such takings. That includes leaseholds. It includes all property for which you have a right of use. And in this particular case, not only in this witness but in the other witnesses the evidence was not as to depreciation in value of a mill. Suppose we take a mill. The evidence shows the mill as composed of a chain of rollers, apparatus to wash the cane, boilers to generate steam to run the engine; that goes into vacuums; the juice when extracted goes into vacuum pans and reboiled and reboiled; then it goes through various other processes until the final, until it finally goes into the centrifugals, and out comes raw sugar which is reboiled and out comes white sugar. If we follow this to its logical conclusion, you'd have to value each train of miles—you'd have to value the building separately, you'd have to value the engines. But it is all part of a going concern. And it has been the evidence consistently, showing consistently that fact right

from the beginning of this case, and from the testimony of Mr. Austin and the testimony of everyone else, that the property is brought together, integrated as a whole and conducted as a whole [1746] in this enterprise for the growing of, manufacture of raw sugar, and from the raw sugar into white sugar.

Mr. Crozier's testimony as given in this Court was very consistent, in spite of the very gruelling cross-examination that he was subjected to. He stated, as did other witnesses, that he did not place a money value on any of these particular items. In other words, he did not take into consideration the profits as such, capitalize them, and arrive at a value by capitalizing prospective profits, either the future or the past.

Now, in the Baetjer case the question that the Court was immediately considering was the value, was the loss in value of the excess equipment that that particular matter was, that particular matter being the mill. And the evidence was that "... they had suffered a loss to the extent of \$270,000 in value of excess equipment." The meaning of the phrase just quoted is not altogether clear. If it means that after the taking the appellant's mills had an uneconomic overcapacity so that they could not be operated by the appellant as efficiently and therefore as profitably as before the taking, then the stricken evidence shows only a loss to business which resulted as an unintended incident of the taking, and so a loss not compensable under the doctrine of Miller against the United States. On

the other hand, if it means—and there is other evidence tending to show that this is what the witness who used the phrase meant by it—that the overcapacity of the mills with respect to cane land [1747] available to supply them has depreciated their value on the market to the extent of \$270,000, then the evidence would tend to show a compensable loss. “In short, the stricken evidence would indicate a compensable loss only if it means that after the taking the appellant’s mills had an uneconomic overcapacity so that they could not be operated by anyone as efficiently and therefore as profitably as before the taking, this being a matter which a hypothetical willing buyer would consider in determining what he would pay for the property.”

Now, that’s the evidence here. Say this mill will cost more to operate and they tried to recover for the increased cost, that would be a business loss. But if the evidence shows that the mill—and I am only using the mill as an example—because of the fact that it was built to a certain capacity and no longer available for operation of the amount of cane that it was built to operate, became less in value, not only to this enterprise but generally would be less valuable than before the taking, then there is a loss that can be recovered. And that in effect is the holding in the Baetjer case and in the other cases that we brought to the Court’s attention. If a witness goes on the stand and considers only profits, it might be said that there was a certain element of speculation as to what might occur

in the future. But when a witness goes on the stand and takes into consideration the fact that this had been a profitable enterprise, as the record clearly shows it had been, [1748] that by reason of these takings it dropped from a 22,000 ton plantation to a 15,000 ton plantation, that it will be all of the properties comprising the enterprise, the mill, the irrigation system, the other improvements, dropped in value, then that indicates a loss that is recoverable in an action such as this. And that's the evidence given by Mr. Crozier and the evidence given by all the other witnesses. It stands to reason that if anyone was going out there, assuming that the plantation company could continue, and the evidence shows that when it dropped to a 15,000 ton plantation it could no longer continue, therefore it became a question of doing the best thing possible to get rid of it. But assuming any willing purchaser going there would say they have here a mill for a 22,000 ton capacity when all I need is one for 15,000. He would pay not for one that would manufacture 22,000 tons but would pay for one that would manufacture 15,000, which would be less. And that is the question here.

In the absence of market at that particular date, there being none, you can consider fair value. But still the same test would apply. And we are no more confined to taking up each item separately and saying, did you attach to that a money value? No. Because you wouldn't operate a plantation that way. Nor would you sell a plantation that way, if it was a going concern. If it ceases to be a going

concern and you must liquidate, then you sell it the best way you can and may take [1749] the individual items. But when it is a going concern, and that's what it was prior to these takings, then you sell it as a whole. Now, it is the same principle in that case as there was involved in the case I cited to your Honor previously. That's the Stephenson Brick Company against United States, 110 Federal 2nd, 360, reading from page 361. The question there was the value of a plant which was to manufacture bricks, and they claimed damage to the plant because of the taking of certain of the lands.

"The owner is entitled to be compensated not only for the separate value of the land taken, but also for the loss in value of the remainder of the tract in the use that was made of it at the time of the taking. There being no established market price, the fair value at the date of the taking of the whole plant, excluding personal property, ought to be ascertained, looking upon it as a plant organized for a business shown to be generally successful and having a good prospect; and also the fair value for sale of what was left afterward. The difference in the values is the just compensation to be paid."

Now, it didn't require in that particular case to value each particular part of that plant. It took into consideration the plant, the property as a whole, the purpose for which they were using it.

Now, in the particular instance before this Court, the particular case, the properties as a whole are

combined and used [1750] for one purpose, and that is a sugar enterprise, growing sugar, growing cane, manufacturing it into sugar, purchasing outside raws and manufacturing them into white sugar. There is no difference in principle between doing that and between making bricks. That was the enterprise involved in the Stephenson Brick Company case, and in this case the enterprise involved is one to make sugar. And that is the evidence that was given before this Court.

As to the weight of that evidence, now is not the time to argue it. That is something for the Court to decide and something for counsel to argue at the close of the case. As to its admissibility, it is certainly admissible under the decisions of these courts.

The Court: What have you specifically to say to those exhibits admitted conditionally?

Mr. Vitousek: If the Court please, on those—

The Clerk: Fourteen to sixteen.

The Court: Did you include 14, Mr. Rathbun?

Mr. Rathbun: Yes, your Honor.

The Court: Fourteen, fifteen and sixteen.

Mr. Vitousek: Well, now, if the Court please, the first one relates to the point I was making and Mr. Crozier made in his testimony, and that is the fact that the lands on these islands are closely held; they are closely held by landlords, estates chiefly, and the only way an enterprise can be conducted, [1751] such as this, is by leasing the land. And that's the business in which the estates are in—they lease the land. And the business of

this particular defendant is in using those lands as lessee for the growing of sugar cane. It tends as an accident in proving, in the chain of proof or a link in the chain of proving and showing that this was a sound enterprise conducted in the customary business manner in which enterprises could be conducted in the Territory, and particularly in the City and County of Honolulu. The next one, 15, relates to cane acreage, both fee and leasehold, showing the percentage of each, which is simply a summary tied up with the first. The third is the same, applied to the Honolulu Plantation Company, showing the percentage of fee, incidentally, showing exactly in acreage and percentages. Certainly Mr. Crozier had it before him, but he couldn't pull out from memory the exact figures he made up in this exhibit. And then it is reducing that to percentage and fee and leasehold.

Now, in the opening statement we said that this — and we intended to show that — is what was known as a leasehold plantation. The evidence shows the plantations in this Territory are well-known by two classifications, one, whether irrigated or unirrigated, and two, whether leasehold or fee. And if leasehold or fee, there is a difference in the value. One was placed, I believe, roughly at \$1,500 and the other \$1,000 an acre, \$1,500 for fee and \$1,000 for leasehold, the fact being [1752] that is requires less capital investment. In other words, if I was going to buy that plantation I wouldn't have to put up as much money as a purchase price for leasehold as I would for fee

simple. And that's where these exhibits tie into the story.

The Court: Do you wish to be heard, Mr. Rathbun?

Mr. Rathbun: No, your Honor, we stand on the record.

The Court: It is rather a large motion to digest. I think the best thing to do at this time is to overrule the motion and grant you an exception. And that is the ruling of the Court. You may swear the next witness.

Mr. Driver: Might I inquire, your Honor, is that one of the reasons for your Honor's ruling, that it is too elaborate for the Court to consider?

The Court: Yes.

Mr. Driver: Well, then, may we renew it item by item and have a specific ruling on it?

The Court: At this time?

Mr. Driver: Yes. In other words, we quite agree that this is a large order for anybody to consider; neither do we want to be precluded under the well-known established rule that an objection of this sort must be specifically and particularly brought to the Court's attention. In other words, we don't want to fall into that criticism simply because we put it in this form.

The Court: Well, if it will be of any assistance to you, [1753] I'll give you an exception on each one of the grounds mentioned in the motion. Is that what you have in mind?

Mr. Driver: Yes.

The Court: Very definitely I'll give you a specific exception to each one of the grounds mentioned in the motion. All right.

Mr. Vitousek: If the Court please, may we have a short recess?

The Court: All right.

(A short recess was taken at 9:35 a.m.)

After Recess

PHILIP EDMUND SPALDING,

a witness called in behalf of the Defendants, being duly sworn, testified as follows:

Direct Examination

By Mr. Vitousek:

Q. What is your full name?

A. Philip Edmund Spalding.

Q. And what is your position?

A. President of C. Brewer and Company, Ltd.

Q. How long have you been President of C. Brewer and Company?

A. Since March of '41.

Q. And were you connected with that company before that date? [1754]

A. In connection with that company since October of 1924.

Q. When you first went with the company, what was your position?

A. My position was in charge of the merchandise and purchasing department.

Q. And?

A. And I had that as a major portion of my business, for my part of the business for about three or four years. I then moved into an executive position with the company. I think I became a

(Testimony of P. E. Spalding.)

vice-president in 1928 or '29. I don't remember just when.

Q. And when you were in the executive position, what in general were your duties?

A. Well, it had generally to do with all the various plantation enterprises that C. Brewer and Company represent, in connection with their leasing of land, purchases of land, sales of sugar, negotiating contracts.

Q. Would you state in general the business of C. Brewer and Company?

A. C. Brewer and Company is the agent for 12 plantations.

Q. Sugar plantations?

A. Sugar plantations, which means that they handle the sale of sugar, the financial necessities of the various plantations, the tax problems, real estate problems, labor problems, planter problems, shipping, transportation of every kind, in [1755] general act as a sort of a managing director.

Q. It supervises the activities of the plantation?

A. That's it, simply.

Mr. Rathbun: Would you mind letting him testify, Mr. Vitousek?

Mr. Vitousek: Well, I think, if the Court please, that was a question of the summary of what he stated. I'm not trying to lead the witness.

The Court: I'm sorry, I didn't hear what was going on. I was talking to the Clerk.

Mr. Rathbun: I was suggesting that he let the

(Testimony of P. E. Spalding.)

witness testify, not him. He didn't summarize at all by his question.

The Court: If you will refrain from that, please—

Q. What is your connection with the Honolulu Plantation Company, the defendant in this case?

A. My position is that of attorney-in-fact for the company, and at the present time I am the Vice-President of the Company.

Q. Vice-President?

A. Vice-President of the Honolulu Plantation.

Q. Of the Honolulu Plantation Company?

A. Yes.

The Court: Mr. Vitousek, are you all right?

Mr. Vitousek: Yes, your Honor.

The Court: You may sit down while asking questions. I [1756] think we had better continue this case tomorrow morning.

Mr. Vitousek: Yes, your Honor.

The Court: Is it all right with you, Mr. Rathbun?

Mr. Rathbun: It's all right with me.

The Court: We'll adjourn until tomorrow morning.

(Due to Mr. Vitousek's illness, the Court adjourned at 9:53 o'clock, a.m.) [1757]

Honolulu, T. H., January 8, 1947

The Clerk: Civil No. 514, United States of America versus 257.654 acres of land, and Civil

Nos. 521, 525, 527, 529, 532, 533, 535, 536, 540, 544, 548 and 684, for further trial.

The Court: Are the parties ready to proceed?

Mr. Vitousek: Ready.

PHILIP EDMUND SPALDING,

a witness in behalf of the defendants, having previously been sworn, resumed and testified further as follows:

Direct Examination—(Continued)

The Court: Mr. Spalding, you are mindful of the fact that you are still under oath?

The Witness: Yes, sir.

By Mr. Vitousek:

Q. Mr. Spalding, I hand you Exhibit 4-A, certified copy of a power of attorney, Honolulu Plantation to P. E. Spalding, L. D. Larsen, W. Jamieson and H. T. Kay, and ask you if you are the P. E. Spalding named in that document?

A. Yes, I am.

The Court: You will have to speak louder so everyone can hear you. A. I am. [1758]

Q. And I also hand you Exhibit 4-B, power of attorney, Honolulu Plantation Company to P. E. Spalding, S. L. Austin and/or H. T. Kay, and ask you if you are the P. E. Spalding named in that instrument? A. I am.

Q. Will you state to the Court in general your knowledge of the Honolulu Plantation Company and its affairs?

A. Well, I have been identified with Honolulu

(Testimony of P. E. Spalding.)

Plantation Company ever since my connection with C. Brewer and Company in 1924. I have a general knowledge of the whole plantation operations, not detailed, but a general operation, financial affairs. I was very instrumental in the negotiations of the major leases that were renewed in 1936, and in general had a great deal to do with the sales of their refined sugar and the marketing of the sugar.

Q. Have you been at the property, the location?

A. Many times.

Q. And have been over the properties?

A. I have been over the properties on many different occasions, so that I know, I know them well physically.

Q. How about the mill, have you been over that?

A. I'm not a mill expert. I couldn't tell you the different pieces of machinery, but I know the mill. I know its make-up and how it operates.

Q. And the irrigation system? [1759]

A. In general.

Q. Now, you stated you had a large part in the negotiation of the renewal of leases. Will you state whether or not you are familiar with the outstanding leases whereby Honolulu Plantation Company holds land?

A. Yes. Well, the major leases were with the Bishop Estate, the Austin Estate, Queen Emma Estate, Damon Estate, the McCandless lease, and the lease with O. R. & L. would be the major leases.

(Testimony of P. E. Spalding.)

Q. Will you state your knowledge regarding generally regarding the growing of cane, the manufacture of the same into sugar? Are you familiar with that?

A. I know the general procedure, yes.

Q. It has been your business?

A. It has been my business for 20 odd years.

Q. Now, Mr. Spalding, I want to call your attention to Exhibits 13-A to 13-T inclusive, the annual reports of the Honolulu Plantation Company, years 1924 to 1943 inclusive, and ask you if you are familiar with those, the contents of those reports?

A. Well, I am familiar with them. I have gone over them in times past. I probably don't remember the details.

Q. You have gone over them? A. Oh, yes.

Q. And what in general do those reports contain? [1760]

Mr. Rathbun: I object to that. They state for themselves what they contain.

The Court: The objection was that they speak for themselves.

Mr. Vitousek: If the Court please, the reports contain figures, but from where they get the information, and so forth, that's what we are referring to, how these reports are built up.

The Court: That's a different question. I think the objection as stated to the question is good.

Q. Mr. Spalding, turning to Exhibit 13-T, this 13-T contains pages 10, 11, 12, 13, 14, 15, and un-

(Testimony of P. E. Spalding.)

numbered pages following 15, a series of computations and figures, and at the end in a blue document attached also a series of figures. Do you know where those computations were taken from?

A. They were all taken from the books of the company. They are the summary of the company's accounts.

Q. Now, on the blue sheet attached to the end of the document, at the top is what they call Exhibit "H". That shows a summary of the leases?

A. Of the leases.

Mr. Rathbun: I object. That speaks for itself what it shows.

The Court: Isn't that so? Isn't that so, that the summary speaks for itself? [1761]

Mr. Vitousek: If the Court please, it is quite true the summary speaks for itself, but the Court will recall counsel said that these reports do not accurately reflect to the purchasers of stock the full information.

Mr. Rathbun: I didn't state any such thing. I asked questions of a witness to that extent.

Mr. Vitousek: Yes, he asked questions of the witness that indicated that, and I am trying to show that these are the reflection of the records of the company. This particular exhibit is part of the general exhibit, Exhibit "H", which shows the summary of the leases.

Mr. Rathbun: All of which doesn't make it proper for him to say what that shows.

(Testimony of P. E. Spalding.)

The Court: I think the objection is good. It speaks for itself.

Mr. Vitousek: Exception, if the Court please.

The Court: You may have an exception.

Q. You stated you were familiar with the leases, as I recall it. Will you examine the summary contained on Exhibit "H" and state whether or not in your recollection that is accurate?

A. Yes, that is the statement of the major leases of the company.

Q. Now, Mr. Spalding, in regard to the Honolulu Plantation, would you give your opinion as to whether or not it [1762] has been successful or unsuccessful prior to the date of the first takings here in June 21, 1944?

Mr. Rathbun: I object to that as incompetent, irrelevant and immaterial; it calls for a conclusion. That is not the proper way to prove this thing.

Mr. Vitousek: If the Court please, this person is the man who has handled these plantations, and if there is anyone that would know, he would know. It calls for an opinion. That's quite true. That is based on information, the same as the other witnesses testified as to the profitableness or unprofitableness, and subjected to an examination on the same. This man has shown that he is the one actively in charge of this plantation here and its affairs, familiar with its affairs, and certainly can give his views on that subject the same as he can give it on other matters pertaining to this plantation.

(Testimony of P. E. Spalding.)

Mr. Rathbun: The rules of law say otherwise. The witness can't testify to conclusions just because he has knowledge of something. He must testify to facts.

The Court: No doubt the witness has an opinion on this subject but I am not inclined to think that I can receive it. We are interested in facts and the facts from which that issue could be determined seem to me to be reflected in the documents that are here in evidence. I think the objection is good.

Mr. Vitousek: Well, if the Court please, I'd like to be heard further on that matter. [1763]

The Court: All right.

Mr. Vitousek: We spent a lot of time in evidence on this. We find in every case cited they give an opinion as to the profitableness or unprofitableness of it. The facts may speak for themselves but counsel in his examination tried to say, to read different facts into the reports, or different inferences. Now, the witness in testifying can testify as to the placing of value on this enterprise. He certainly can consider whether it's been successful or unsuccessful. That's one of the elements we have gone into and the first time it's been objected to, as to whether it's been profitable or unprofitable. That is a matter of opinion, because while the facts do speak for themselves, if the Court desires to interpret them, it is for the expert to interpret those, the information as contained in these reports.

(Testimony of P. E. Spalding.)

The Court: The situation heretofore has been quite different. We have had people on the stand who purported to be real estate experts appraising the property in certain regard and in connection with that appraisal of the property they have, as one of the factors of their opinion, stated whether or not in their opinion it was or was not a successful operation.

Mr. Vitousek: That latitude is even greater under the authorities representative of that, as this man is the owner and as the owner can testify as to his opinion. He is going to testify as to the loss in value here, and we have done with [1764] him as we have done with the others, to build up a foundation first instead of first asking the opinion and then asking all the reasons. There are two ways of doing it. We chose that particular method. And that, of course, is part of his opinion the same as it may be his opinion as to the effect of the takings afterwards. The latitude is very great. It is a matter for the Court to decide the weight of his opinion, in view of all his knowledge of it, but it is even greater than it is with an expert.

The Court: At this present time, at this particular juncture of his testimony, I don't see it. You may have an exception to the ruling.

By Mr. Vitousek:

Q. In regard to the suits now before the Court, consolidated actions, Mr. Spalding, are you familiar with the properties being condemned under these suits?

(Testimony of P. E. Spalding.)

A. I am in general familiar. I couldn't say just exactly which areas of land in the plantation are covered by the particular suit, but I am referring to the—but I know the land in general, yes.

Q. As I understand it, you said with your knowledge you would then be familiar with the property remaining? A. Yes.

Q. Located at Ewa, Aiea, Pearl Harbor?

A. Ewa area near Pearl Harbor and both sides of Aiea. [1765]

Q. Now, referring to the mill particularly, before the takings involved in these proceedings, what was the tonnage of the plantation?

A. That is these last takings in this proceeding?

Q. That's the last takings. We are only concerned with the last takings involved in these suits in one trial.

A. Well, the area serving the mill had a crop potentiality of around 22,000 tons of sugar a year.

Q. And after the takings involved in these proceedings?

A. Fifteen thousand, sixteen thousand.

Q. In other words, the tonnage of cane to be milled dropped from around 22 to around 15?

A. No, the tonnage of sugar produced from the cane dropped about that way.

Q. What effect, if any, did that have upon the mill, the operation of the mill?

A. It became a very expensive operation.

Q. Could it be operated as efficiently?

(Testimony of P. E. Spalding.)

A. By no means. It was a case of running two shifts part of the year or one shift, or if you ran three shift operation it would be a very short period of the year to accommodate the remaining cane. You didn't have a full year's operation at all.

Q. Now, did that have any effect on the value of the mill before and after the takings? [1766]

Mr. Rathbun: That calls for a conclusion and I object to it for that reason.

Mr. Vitousek: Certainly it calls for an opinion, an opinion on value of the mill.

Mr. Rathbun: It calls for a conclusion. That's my objection.

Mr. Vitousek: Well, I don't know what he calls a conclusion. Anything is a conclusion. But we are asking this witness his opinion on the value of the mill before and after the taking, if it had any effect on it. It's certainly a very material question in this case.

Mr. Rathbun: That was not the question.

The Court: Not the question?

Mr. Rathbun: No.

Mr. Vitousek: May I have that?

(The reporter read the last question)

Mr. Rathbun: That's a question for the Court to decide, on the facts.

Mr. Vitousek: If the Court please, how is the Court going to decide it unless it gets the opinion of the people on the value? From that the Court does decide it. It is true, on the value, but this

(Testimony of P. E. Spalding.)

witness can testify his opinion as to whether the value is more or less. Then we can summarize it by the figures.

The Court: On what theory is this witness presented—as [1767] a real estate expert?

Mr. Vitousek: No, he is not presented as an expert, if the Court please. He has been shown to be the Vice-President of the Company. He has been shown to be the person who has handled the affairs of the Company in Hawaii.

The Court: You have him here as the owner?

Mr. Vitousek: As an owner. We are not presenting him as an expert, although he could qualify himself.

The Court: Well, the thing that disturbs me—it hasn't been objected to and I don't particularly raise it but I will mention it—the thing that disturbs me is how many officers of the corporation can you bring in here to testify as owners?

Mr. Vitousek: If the Court please, we have examined into the rule on that matter. If the Court will recall, we only brought in two. One came in and testified simply in regard to one phase of the case. We are now on the second phase of the case.

The Court: Mr. Austin?

Mr. Vitousek: Mr. Austin. And there is no limitation on the amount except as the Court in its sound discretion can limit any type of evidence. The power of attorney runs to both people. They

(Testimony of P. E. Spalding.)

have both actively been in on the affairs of the company.

The Court: I will allow the question to be answered. You may have an exception. [1768]

A. It had a very material value on the mill, an effect on the value, with this taking.

Q. What was the effect?

A. Well, the effect—I don't know as I can answer that just in dollars and cents, or the effect on the mill itself, but the effect on the property as a whole. The effect on the mill was to make it a very much more expensive operation, of much higher cost operation. Therefore, the value as such was greatly reduced for the work it had to do.

Q. In regard to the irrigation system, Mr. Spalding, that was—

Mr. Rathbun: Pardon me a minute. I move to strike that answer also as a conclusion of the witness relating to the province of the Court, invading the province of the Court.

The Court: Do you wish to be heard on that?

Mr. Vitousek: If the Court please, I've got cases if the Court would like to hear them where he can give his opinion. This is not invading the province of the Court. The question is of the value less before and afterward. The province of the Court is determining the damage. And from a whole group of witnesses the Court will arrive at its conclusion, if there is damage, and if so, what, if any. That is not invading the province of the

(Testimony of P. E. Spalding.)

Court. If so, every expert that goes on the stand is doing it.

Mr. Rathbun: Well, he just stated he wasn't an expert. [1769]

Mr. Vitousek: Well, everyone that gives an opinion. An owner has a greater latitude than an expert in giving opinion.

The Court: He is testifying as one of the owners, and the motion to strike the answer is denied and you may have an exception. Proceed.

Q. Mr. Spalding, in regard to the irrigation system of this plantation, just in general language describe what it is and what it was at the time of the taking?

A. Well, it is a series of pumping units and wells located at different sites in the area. One major irrigation set is of the Hawaiian Electric Company's plant at Waiau where the condenser water is pumped back up into the plantation. That would be the westerly end of the plantation. Throughout the other areas of the plantation are pumps located from lower Halawa and in Aiea itself and scattered through the plantation. There are a series of booster pumps that lift the water from the major sources on up to higher elevation.

Q. Do you have reservoirs?

A. Reservoirs located in different sites.

Q. How about ditches?

A. Oh, yes. Ditches—there are siphons, there are reservoir ditch siphons and pipe lines that cover the whole plantation. The major ditches at

(Testimony of P. E. Spalding.)

450 foot elevation and then there are other major ditches that run across the plantation parallel to it. [1770]

Q. Well, was that irrigation system installed before or after these takings?

A. Well, on that, the date of the takings, it was installed before.

Q. Now, did the takings involved in these proceedings have any effect upon the value of the irrigation ditches?

Mr. Rathbun: I object to that for the same reason, if your Honor please, that it's a conclusion invading the province of the Court.

The Court: Same ruling, same exception.

Mr. Vitousek: If the Court please, I'm asking in general, not the exact amount. That will be brought up later.

The Court: You may answer the question. Do you have it in mind? Do you want it repeated?

The Witness: Yes, I have it in mind.

The Court: You may answer it.

A. It had a very serious effect on the value of the irrigation system because it forced the abandonment of some of the ditches, the siphons, pipe lines, the use of some of the wells and pumps that formerly served that particular area.

Q. Well, now, some of this irrigation system was on lands taken?

A. None of the wells or pumps were on lands taken but the irrigation ditches that served the lands were on the lands taken. [1771]

(Testimony of P. E. Spalding.)

Q. Well, then, you are familiar with the part of the irrigation system remaining after the takings, are you?

A. I wouldn't like to have to describe it but I am familiar in general with it.

Q. Well, that's the part I'm going to ask you in regard to. Did it have any effect on the value of the irrigation system, including wells, pumps and ditches remaining after the taking?

A. Well, it had a material effect because it reduced their efficiency and reduced their economic use. Some of the takings, I think particularly that of the Hawaiian Electric pump that was set in to deliver about 25 million gallons a day, the amount of water being taken from it after the taking was reduced to around 17 million a day. The efficiency was seriously impaired.

Q. How about the electric system, generating—

A. Well, I know there was a generator at the mill of two thousand, I think about two thousand kilowatts capacity, that was installed just before the war.

Q. That remained after the taking?

A. Oh, yes. That was there. There was another unit there also which was an inefficient one.

Q. Well, did the takings have any effect upon the value of the electric generating distribution system?

Mr. Rathbun: I object to that on the same grounds as to the original question. It invades the province of the Court. [1772]

(Testimony of P. E. Spalding.)

The Court: Same ruling, same exception. You may answer the question.

A. Well, I don't think I could answer that question other than this way, that I don't know the power consumption of the various units that were operated by that generator and how much might have been affected by this taking. The company also purchased a considerable amount of power from the Hawaiian Electric Company.

Q. Well, did the takings have any effect on the value of the other property of the company other than moveable personal property, personal property, either increase it or decrease it?

A. Well, the result of these takings was to make it an unprofitable, uneconomic enterprise—

Mr. Rathbun: Just a moment. I couldn't hear that question.

(The reporter read the last question)

Mr. Rathbun: Well, that's a question like the other one. I object to that as calling for a conclusion and invading the province of the Court.

The Court: Same ruling same exception. Did you hear the answer?

Mr. Rathbun: No.

The Court: Read it.

(The reporter read the last answer)

By Mr. Vitousek:

Q. On the date in question involved in the filing of [1773] this suit until June 21, 1944, Mr. Spalding, on that date or on or around about that date, was there any market for a plantation

(Testimony of P. E. Spalding.)

such as Honolulu Plantation Company, a free and open market?

A. No, no, there is no free and open market for a plantation in the Territory in almost any time. Certainly at that time there was none for Honolulu Plantation.

Q. Well, what was the condition of the Territory at that time.

A. We were in a condition of the state of war at that time, and your freedom of action was very restrained. These takings that occurred were taken under rights of entry and they ran along in various small amounts and varying amounts from time to time. There was no court to appeal to. There was no way of getting into court. I don't know whether this is all right, but it went along to a point where I went out to the Navy Yard and asked the Commandant to either desist from any further takings or else bring condemnation suits so at least we could get into court to have a hearing on our damages. And finally I refused to sign a right of entry at one time and reached an agreement with the Commandant that we would not forcibly eject the Navy from the lands that they had moved in on. nor would we bring court proceedings against the individual officers who ordered entry on the land, providing they brought condemnation suits within a reasonable period. And these suits are the result of that understanding. We were simply helpless. [1774]

Q. Now, Mr. Spalding, what in your opinion is

(Testimony of P. E. Spalding.)

the amount of the depreciation in the fair value due to the takings involved in these proceedings now before the Court of the properties of the Honolulu Plantation Company at Aiea on Oahu, near Pearl Harbor, remaining after said takings and used by it in conducting a sugar plantation and manufacturing enterprise conducted at said Aiea, including real property, leaseholds, improvements, permanent fixtures, but excluding moveable personal property and inventories and bearing in mind your knowledge of such properties, your knowledge of the leases whereby the Honolulu Plantation Company as lessee holds certain properties, and assuming the takings occurred June 21, 1944?

The Court: Just a minute.

Mr. Rathbun: I object to that. The witness has shown no qualifications to testify to any such question as that. He never sold a plantation as far as it appears. No other qualification whatever.

The Court: Will you read the question back to me?

(The reporter read the last question)

The Court: Your objection is that he has no qualifications?

Mr. Rathbun: Yes, your Honor, to testify to any such question as that.

The Court: The witness here being allowed to testify as one of the owners—

Mr. Rathbun: That's right. [1775]

The Court: —I will allow him to answer it.

(Testimony of P. E. Spalding.)

You may have an exception to the overruling of your objection. Do you have the question in mind? If you can answer it, you may.

A. Well, the company employed an expert to determine that amount of damage, who I think has testified here.

Mr. Rathbun: I object to that, now. The record shows what was testified to. This man can't adopt it.

The Court: No, you will have to answer the question yourself, if you can.

A. Well, I can testify as to what I considered the value after the takings, if that is permissible.

Mr. Vitousek: If the Court please, I don't know whether the witness understood. It calls for the amount in depreciation of value, not as to the amount before or after the takings. He can testify as to that.

The Court: That's why I had it reread. It was a little different than the other question. Do you want the question read again?

A. No, I understand it now, but it is a very difficult thing to recapture the situation from the position of an owner, when we take a mythical date which is the apparent, which is apparently the date of condemnation and the takings, and taking place over a period of months prior to that time, being very closely associated with the takings, I find it very difficult to put myself back in some later date. I think I could give [1776] an opinion as to the difference in value between before the

(Testimony of P. E. Spalding.)

war and after, but to pick a point along that descending scale of value and say here it is, is difficult for me.

Q. Can you give a minimum figure?

Mr. Driver: Minimum figure of what?

Mr. Vitousek: If the Court please, the witness said he cannot give the exact figure.

Mr. Driver: No, he didn't say that. He said he couldn't answer your question. That's what he really said.

Mr. Vitousek: No, he said it's very difficult. That's what he said.

Mr. Rathbun: It's difficult, of course. It wasn't difficult for the experts at all.

Mr. Driver: This witness is being very frank and straightforward about it.

The Court: The question didn't call for a maximum or minimum. I don't think the subsequent question of a minimum figure is in order.

Q. The answer is that you can't answer?

The Court: To your last question I sustained the objection.

Mr. Vitousek: I understood, and I am asking the witness if he can't answer the first question.

The Court: Apparently you are being asked the same question over again.

Mr. Driver: A further objection if he is. [1777]

The Court: Ordinarily that would be sound, but because of the complicated nature of the question, I will allow it to be restated to the witness. Do you want it read to you again?

(Testimony of P. E. Spalding.)

A. The situation, the situation with the plantation was, a valuable piece of property operating as a profitable concern, which began to lose its value as it—for some time before the war when these lands began to be taken. And then, as the value became a descending curve, not a straight line but a parabola, and at one point it was pushed over the edge, these takings pushed it over the edge from a profitable operating concern to an uneconomic unit, at just what point that was, just what that time was, you can't place, I can't place my finger on it. I know with the takings the company was finished as an operating unit, as an economic unit, as an economic concern. I know what the experts testified to and I think that it is too little.

Mr. Rathbun: I object to that what the experts testified to. They had enough trouble without you getting into it, Mr. Spalding. I think you'd disagree with them if you talk too much on it.

The Witness: I beg your pardon?

By Mr. Vitousek:

Q. Mr. Spalding, as I understood you to say, some time in these takings it was pushed over the edge? A. Yes.

Q. Involved in this suit? [1778]

A. In the takings involved in this suit, yes.

Q. You understand in this question I said to assume they occurred June 21, 1944?

A. Well, that was the date that it went over

(Testimony of P. E. Spalding.)

the edge, if that is the date of it, if it is the date of record.

Q. Well, what did you mean that it went over the edge?

A. It became an economic failure. The property could no longer exist as a profitable concern.

Q. Did that have any effect on the value?

A. Very material effect on the value.

Q. What was the effect in general terms, less or more? A. Much less.

Mr. Rathbun: I object to that. It calls for a conclusion and invades the province of the Court.

The Court: May I have that?

(The reporter read the last question and answer.)

The Court: The objection comes ahead of the answer. The answer may stand. You may have an exception.

Q. Mr. Spalding, as I understand, you said it was pushed over the edge. Now, I want to ask, was there any attempt that you know of, a possibility of replacing the land lost due to these takings?

A. No, there was none. There was no possibility. We tried everything we could try to find additional land, to build the plantation back to a profitable enterprise. We even tried [1779] dry land cane at higher elevation to see if it could be done.

Q. Then this plantation, as I understood from

(Testimony of P. E. Spalding.)

other testimony, purchases raws outside to make whites? A. Yes.

Q. What was the source of those raws before the war?

Q. Raw sugars were purchased from Waimanalo Sugar Plantation and then also from Kaeleku Plantation over at Hana at Maui.

Q. And Kaeleku is out of business?

A. Kaeleku is out of business. There were occasional purchases of other sugars but I don't remember—small amounts.

Q. And during the war?

A. During the war the major source of the raw sugar was from the C. and H., the California and Hawaiian Sugar Corporation. The purchases were arranged through them to draw sugar from their plantations to the plantations with which they hold contracts on this island, to release to Honolulu Plantation Company sufficient sugar to meet the requirements of the community and of the Army and Navy in the Central Pacific. The Honolulu Plantation was requested by the Navy and the Army to take care of all their requirements throughout the Central Pacific.

Q. After the war was over, hostilities ceased, and under peacetime conditions, is there a possibility of purchasing enough raws to keep that plantation going, the mill going rather? [1780]

A. Well, you could possibly purchase raw sugars to meet the local demands here but certainly nothing beyond that, and the total volume of the

(Testimony of P. E. Spalding.)

situation where you are denied your own cane would make it a very unprofitable, impossible thing to operate on. Very little profit in the handling of this refining operation.

Q. You stated that with these takings the plantation was, as you expressed it, was pushed over the edge. What was the possibility, if any, of selling after that date?

A. Well, I approached the Oahu Sugar Company in that period to see if they would be interested in—

Mr. Rathbun: I object to offers and attempts and all that sort of thing, and any attempt to show value in this case, of something that wasn't consummated. It goes under the same rules of all evidence of that kind in a condemnation suit. Offers are not admissible and therefore attempts to offer are not.

Mr. Vitousek: Well, if the Court please, the offer of negotiation, that culminated in a sale; it is not a question of getting into the figures of the offer; it is the negotiation that might have culminated in a sale. The Court will recall that in the cross-examination of Mr. Schmutz the question was—he recited this so-called claim showing the difficulty of selling the plantation to anyone outside. The question was then that he did sell it at that time. And I called the Court's attention to that, that we will have to explain it later. [1781]

The Court: I remember that very distinctly. There was some reference made at that time to the

(Testimony of P. E. Spalding.)

sale of this company that has occurred since these takings, and that you indicated you would bring out at a later date. Is that what you are going into now?

Mr. Vitousek: That's right, if the Court please.

The Court: Well, if that's the purpose, then I will allow it. The objection is overruled. You may have an exception. Will you repeat the question?

(The reporter read the last question.)

The Court: You may continue with your answer.

A. —purchasing, and they said no, that we had nothing to sell, as long as with the war on—

Mr. Rathbun: I object to that kind of testimony, what the Oahu Sugar Company said. It's hearsay and every other objection.

The Court: The objection to that is good. Can you make your question a little more specific so that he won't go all over the lot in getting to the final subject that you said you were going to bring out?

Mr. Vitousek: I think the confusion was probably held to that time. He said there was no sale at that time.

Q. Has there subsequently been a sale of that plantation?

Mr. Rathbun: I move that what the Oahu Sugar Company said be stricken out. [1782]

The Court: It may go out.

Q. May I withdraw this last question? There was an attempt made to sell the plantation around about the date of these suits. Was that unsuccessful?

A. Unsuccessful.

(Testimony of P. E. Spalding.)

Mr. Rathbun: I object to that.

The Court: Just a minute.

Mr. Rathbun: Pardon me. Were you finished?

Q. Well, was it successful or unsuccessful?

Mr. Rathbun: Well, I object to that. It's calling for a conclusion.

Mr. Vitousek: A conclusion whether you sold it or did not sell it?

Mr. Rathbun: Well, that isn't your question.

Mr. Vitousek: I said successful or unsuccessful.

The Court: Those words modifying the word "attempting" to sell.

Mr. Vitousek: I said, was there an attempt to sell and was the attempt successful or unsuccessful. I'm not asking for the success of the plantation or his endeavor to sell or not.

The Court: That question may be answered Yes or No.

A. No.

Mr. Vitousek: If the Court please, it's around the recess hour.

The Court: We'll take our scheduled recess.

(A short recess was taken at 10:00 a.m.)

After Recess

By Mr. Vitousek:

Q. Was the plantation, according to the property of the Honolulu Plantation Company, later sold?

A. Yes, they were sold.

Q. When?

A. Under—sold as of January 1st of this year, January 1, 1947.

(Testimony of P. E. Spalding.)

Q. Can you state whether or not the general business conditions were the same as of the date of sale as they were of the date involved in this suit, June 21, 1944?

A. Entirely different conditions. We were in a state of war at that time. Hostilities ceased a year later. We had a year and one-half of nominal peace, and it is a very different situation that existed in a business way.

Q. How about the question of inflation?

Mr. Rathbun: I object to that. What about the question of inflation. What about inflation?

Mr. Vitousek: I haven't got the question out yet, if the Court please.

The Court: State it.

Q. Was there involved in these changes of conditions any question of inflation on it? Was the value of the money the same?

Mr. Rathbun: I object to the value of money. It has nothing [1784] to do with this situation.

The Court: It's pretty far afield, isn't it?

Mr. Vitousek: I don't think so, if the Court please. The question is whether the price paid or the conditions were the same this time as they were then. The question of inflation has gone up—why the conditions may be different. Now, the sale was brought in by them, it was not brought in by us.

The Court: Basically I am wondering why we are going into it at all.

Mr. Vitousek: Because it was brought in by

(Testimony of P. E. Spalding.)

them in their examination. I feel that we are entitled to it now. If the Court please, you will recall they read from this particular document here.

The Court: Congressional claim, exhibit—

Mr. Vitousek: Exhibit for identification. The distance to other mills is so great that the delivery to them would not only be too impracticable but too costly. Then it was brought out it was sold to another company.

Mr. Rathbun: He is referring to Exhibit, Government Exhibit 1, I think.

The Court: Yes.

Mr. Vitousek: For identification. I didn't bring that question in. It was brought in, it was asked by them. Now, we feel we have a right to explain why the sale was, to bring in the sale itself. I think there should necessarily need to [1785] be a connection between the conditions. If they were similar, it would be evidence; if not, it might not be. But the circumstances of the sale in response to that question we have a right to bring in.

The Court: I think in that connection you have a right perhaps to have a general description of conditions, but I don't see any need of getting into the various theories on the extent of inflation. I will allow the witness to compare business conditions as of the date of these takings with the business conditions as of the date of this sale.

A. As they affected the sale, the price of raw sugar for that period, was \$75 a ton, and on January 1st of this year it was \$118.80 a ton, a very material—

(Testimony of P. E. Spalding.)

Mr. Rathbun: I can't hear you. May I have that?

(The reporter read the portion of the last answer.)

A. —a very material increase in price and would have a very natural and material effect on the value of the property sold. And that there was a general relationship between that price of sugar and the price of other supplies and materials. We had OPA in '44 with a ceiling price on nearly everything that was purchased, and January 1st we had none of any effective control. That had a very material effect on the sale price.

Q. What do you mean, the other prices were up in relation to the price of sugar which was formerly at 75 and up to 118? [1786]

A. Well, I mean that the cost of the generator or tractor or truck or any part of the operating equipment, there was a material increase in price—any, most everything you purchase is materially higher.

Q. Now, in regard to the sale itself, did you negotiate the sale?

A. Yes, I negotiated the sale.

Q. Will you state whether or not the sale was on the basis of a going concern or otherwise?

A. We made many studies as to the value of that property, on a break-up and on a sale as a going concern, and so on, and we arrived at a value that we could receive the most from as on the basis of a break-up, on the basis of a break-up,

(Testimony of P. E. Spalding.)

of the property. This sale was, the negotiations started in '43 and carried on over a period of nearly three years before we were able to get the buyers interested, interested in the whole proposal. The Oahu Sugar Company became interested in acquiring the land because they had lost about two thousand, twenty-two hundred acres—

Mr. Rathbun: I object to that, what the Oahu Sugar Company did about acquiring other acres, and what they acquired in another enterprise. It has nothing to do with this case.

Mr. Vitousek: It has to do with the answer to this question as to why they got it, rather the distance to the mill; it is the nearest mill. It has been shown here. And that was the [1787] question that was asked, as to the reason that they would buy it now as against before. In other words, they have lost the land, as the witness stated, and need to replace it, lost it the same as this plantation had through takings by the Government.

Mr. Rathbun: Well, that doesn't excuse trying the Oahu Sugar reasons.

Mr. Vitousek: We are not trying the Oahu Sugar. We are explaining the evidence you brought into the case.

Mr. Rathbun: I say when he says two thousand dollar loss by the Oahu Sugar, that's going into the Oahu Sugar.

The Court: Just a minute. The witness is going beyond the question. We'll get along much better if the witness confines himself to the question,

(Testimony of P. E. Spalding.)

and you state additional questions for him to answer. The basic question was, whether or not it was a negotiated sale.

Mr. Rathbun: And I move that what he said about the Oahu Sugar be stricken.

The Court: It may go out.

Q. Mr. Spalding, if you know, would you state the reasons the Oahu Sugar purchased this property?

Mr. Rathbun: I object to that as incompetent, irrelevant and immaterial, the reasons they purchased it. All that's material here are the prices possibly.

Mr. Vitousek: If the Court please, it materially deals [1788] with this very point that counsel himself brought up. "The distance to other mills is so great that delivery to them would not only be impractical but too costly." Now, that was brought into the suit. The reasons were brought into it by counsel himself on his examination. He opened it up and now we have a right to explain it. If the conditions had changed and the Oahu Sugar lost two thousand acres of land by condemnation, and felt it necessary to replace it, that is the reason. If Mr. Spalding knows it personally, as he testified before and it was stricken, now I am asking him the question directly. It is not going into the damage suffered by Oahu Sugar or the sale. It is just refuting the statement or explaining the evidence that counsel himself brought in on his examination. If that is immaterial, why, of course

(Testimony of P. E. Spalding.)

we are not going into it. But he saw fit to bring it in.

Mr. Rathbun: I saw fit to bring it in pertaining to this company, not Oahu Sugar.

The Court: I'm not too sure that such reasons as Oahu Sugar may have had for purchasing are material. However, the witness may answer the question for such as it is worth, if he can. You may have an exception. Will you read the question?

(The reporter read the last question.)

A. All I can say is that the offices of the Oahu Sugar—the officers of the Oahu Sugar Company told me that it was their reason and interest in purchasing was the fact that [1789] they had lost so much land that they needed to increase their cane production in order to keep the mill at a full operating basis, which made this an interesting, worthwhile purchase.

Mr. Rathbun: I move that that be stricken out for the same reasons that I objected to the question.

The Court: Same ruling, same exception.

Q. Mr. Spalding, various of these reports, I believe commencing with the 1938 report, have shown bank loans on the statements; 1938, \$200,000. Would you explain that loan, please? You can turn to the statements.

A. This particular loan?

Q. Yes.

The Court: That particular report is exhibit what?

Mr. Vitrousek: That's Exhibit 13-O.

(Testimony of P. E. Spalding.)

The Court: Thank you.

A. That probably was due to the fact that that year Honolulu Plantation repurchased from Western Refinery and C and H Refinery a large amount of sugar which had been in their hands for sale. I think they paid them something like \$275,000 for the purchase of that, to repurchase that sugar which was stored in the northwest, I believe. And they undoubtedly borrowed some money at that time to cover that purchase.

Q. Now, there are other statements here showing bank loans. Will you check these reports and handing you the '38 report— [1790]

A. That is '39.

Q. —'39 report, Exhibit 13-P—

A. Well, of course, it is just an ordinary business practice to borrow money. Here they show a loan from Welch and Company of one hundred twenty thousand and of payment of a bank loan of two hundred thousand during the year. It's a common business practice to be borrowing money and go in and out, particularly in a refinery such as this where you may have a great deal of money tied up in inventory.

Q. Well, will you state whether or not the borrowing of money had any relation to the ability to pay dividends?

Mr. Rathbun: I object to that as a conclusion, if your Honor please.

Mr. Vitousek: If the Court please, that is no conclusion. Counsel himself in his examination of

(Testimony of P. E. Spalding.)

various witnesses brought out that they borrowed money and still paid dividends. Now, here is the officer of the company, and we have a right to explain the situation. In other words, not to leave an inference that the company was doing something, borrowing money to pay dividends, when the witness stated it is ordinary business practice to go in and out of the banks.

Mr. Rathbun: The question that I asked was based on the evidence that they put in the case. And the inference to be drawn is for the Court, not for this witness.

Mr. Vitousek: That's all right. We have a right for [1791] this witness to explain the true situation.

The Court: Mr. Reporter, will you read the last question.

(The reporter read the last question.)

The Court: The witness may answer the question. You may have an exception.

A. The borrowing of money had nothing to do with the payment of dividends. It would not, never borrow money to pay dividends.

Mr. Rathbun: I move that the answer be stricken for the reason stated in the objection.

The Court: Same ruling, same exception.

Q. Now, Mr. Spalding, these reports shown here, Exhibit 13, are available for use by prospective purchasers?

A. They are a matter of public record. They are filed with the Treasurer of the Territory.

(Testimony of P. E. Spalding.)

Q. Now, do they have in these reports, do they have in their contents, furnish information as to the fact that the company had suffered losses of land due to takings?

Mr. Rathbun: I object to that as calling for a conclusion to what the reports show, and that is for the Court to determine.

Mr. Vitousek: If the Court please, counsel and in the case of several witnesses asked questions to show that these reports did not contain a statement of the claim of damages due to the losses, or writing off of so-called losses, or any losses due to the takings here as being claimed by us. In other words, they [1792] were misleading and were not complete. Now, if the Court please, these reports were admitted in evidence, only the portion of them relating to the books, the compilation of the books. We propose to show by this witness that all that information is contained in the written matter, all of which was available to the public to be considered; in other words, the lands taken and the lands condemned; that they were open and available; that there is a statement of the claim, that it is not good business practice to actually write it off the books when it is unliquidated, or add it to the books.

The Court: The question is, do these reports show these takings? That is the basic question, isn't it?

Mr. Vitousek: Yes. That is a preliminary question, if the Court please.

(Testimony of P. E. Spalding.)

Mr. Rathbun: That is the question that I objected to.

The Court: You are apparently directing the attention to a part of the exhibit that is not in evidence.

Mr. Vitousek: And we propose to offer it in evidence, the entire exhibit, in view of the questions that had been asked other witnesses.

The Court: The witness may answer the question. You may have an exception.

A. This report of 1943, in the manager's report, draws particular attention to the loss of areas over a period of time. [1793]

Mr. Rathbun: Just a moment. I object to that. You are reading, I take it, from the statement in the beginning?

The Witness: That's right.

Mr. Rathbun: Which the Court excluded. Let me see what you are referring to?

The Witness: This manager's report.

Mr. Rathbun: Well, this part was excluded from evidence, if your Honor please.

Mr. Vitousek: I think counsel didn't hear my purpose. I am going to offer that in evidence. I am just asking him in general. I don't ask for the figures, as to where that information can be found in these reports.

The Court: The question is as to the report as a whole, as to whether or not anywhere in it it contains a reflection of these takings.

Mr. Rathbun: But he is telling now what is in

(Testimony of P. E. Spalding.)

this report that was excluded from the report. He is reading from that. He started to. That's what I object to.

The Court: Well, the question can be answered Yes or No. I take it the answer is Yes?

The Witness: The answer is Yes.

Mr. Vitousek: My recollection in this matter, if the Court please, is that it wasn't offered. We offered in evidence the portion of the reports on stipulation of counsel having to do with directly reflecting the books. Now we are going into [1794] the remaining portion as to what the relation to this case is.

The Court: There is no doubt that at the moment with respect to the annual reports, Exhibit A to the end, the only part in evidence in each one of them is the figures.

Mr. Rathbun: It was on my objection that your Honor excluded them.

The Court: Excluded the manager's report.

Mr. Rathbun: Yes, your Honor, certainly, the president's statement in the beginning of them and all of that.

The Court: I thought it was the other way around.

Mr. Rathbun: Which is nothing but speech-making.

Mr. Vitousek: I never even offered the portion that we are now bringing in. We offered the portion in evidence relating to the book figures so-called, that is, the summary of the book records.

(Testimony of P. E. Spalding.)

There was no ruling of the Court on excluding it or any objection. We said that that was the portion.

The Court: I think we are all in agreement here.

Mr. Rathbun: He offered the document itself. That's my recollection of this record, and I think I'm right about it. And I pointed out to the Court that attached to each one of them was the usual speech by an officer of the company construing certain things, and I objected to it and your Honor sustained the objection to that part of it and admitted only what followed.

The Court: That's right. [1795]

Mr. Vitousek: If the Court please, I'd like to go back to it because it isn't correct as to your Honor excluding it. There was no ruling on it. I said we are just then offering that portion. In other words, we didn't bring it up to an issue for a ruling.

The Court: Well, that may be, but I do know that the only thing that is in evidence at the moment are the figures.

Mr. Vitousek: That is correct.

The Court: Because of objection you limited the offer, and my recollection doesn't go back that far—

Mr. Vitousek: The only point I am making is that there was no definite ruling on it, and we are now bringing it up.

The Court: Well, it isn't before the Court yet.

(Testimony of P. E. Spalding.)

The witness was simply asked the question and answered as to whether or not the reports contained any reflection of these takings, and the answer was Yes.

Q. In what portion of the report is this information?

Mr. Rathbun: Now, may I have that question.

(The reporter read the last question.)

The Court: That's where we got into a discussion, and the question was reframed as to these takings, and that's where the witness answered rather than what you asked. It's substantially the same question.

Mr. Vitousek: But as I understood, the answer was Yes.

The Court: As I understand the testimony to date, the [1796] witness has told us that these annual reports are published records and that they do reflect the manager's portion of the report in these takings.

Mr. Vitousek: That's what I was getting into, in what portion of the manager's report.

Q. Is there a report by the president?

A. There is a statement by the president, there is a statement by the president addressed to the shareholders.

Q. Does that contain, without giving any details, any information regarding takings?

A. Yes.

Q. And any other pertinent information related to value?

(Testimony of P. E. Spalding.)

A. I don't know how much of these figures are in the record. These figures of yield per acre and plantation cane, are they in or do they—because they show—if those figures are in they show a reduction in the crop acres from year to year.

Mr. Vitousek: If the Court please, my understanding is that everything is in except the two reports, the manager's report and the president's report.

The Witness: These figures show, if this is all right for me to say, that the crop in '41 was from 3,335 acres to '42 from a total acres harvested was 3,026, and in '43, 2,924.

Q. It shows the reduction?

A. It shows the reduction in the acreage that was harvested in the figures. [1797]

Mr. Rathbun: I don't know what the purpose of this is. But there is no occasion for showing that by these documents, because it is shown by their own exhibit, the same thing that they introduced in evidence, statements that they had made up. I object to having another word—to make myself clear, I object to having the president or manager. It's quite natural he's not going to say too much detrimental to the management that he has executed during the past year. We all know that. And I am not criticizing them for it, but what he says, construing the figures and the condition of this company, is a bad way to get at it. It's misleading. It's his construction of what the books show to what is attached what is in evidence.

The Court: We haven't got there yet.

(Testimony of P. E. Spalding.)

Mr. Rathbun: That's what he is talking about.

The Court: It's all limited so far as to whether or not there is such information in this annual report.

Mr. Rathbun: If it's simply the number of acres of cane that they had in each year of production, growing cane, that is shown by other exhibits in this case, and I don't see that we need to get mixed up with the president or manager's report on that. They got a detailed exhibit on that.

The Court: I think you are right. The last thing that the witness pointed to was a part of one of these annual reports that was in evidence.

Mr. Rathbun: Well, if it's in the figure part, all right. [1798] I don't know what he was referring to.

The Court: Yes.

Mr. Vitousek: If the Court please, it goes beyond that. The statement, the questions that were asked previous witnesses by counsel for the Government were that there was no calling attention to the public, and we showed these reports were such as would be used, as Mr. Spalding has stated, as the other witness has stated, to any loss due to these takings. In other words, the inference apparently being made that we didn't think there was any loss. Now, we are asking Mr. Spalding if any such statements regarding loss are in the reports, and he said Yes, in the manager's report and in the president's report. Now, for that purpose we now offer into evidence the remaining portion of

(Testimony of P. E. Spalding.)

these reports to show that it was a matter of general knowledge, and it can't be taken that this claim is only being made at this time but as a continuing claim that they had suffered damage due to these takings.

Mr. Rathbun: Are you through?

Mr. Vitousek: Yes.

Mr. Rathbun: I object to the offering on the same grounds, I object to the offering of the president's and manager's reports to which we have been referring, for the reason that my point was not to show that they didn't show the loss of land; my point is and was to show that they ascribe no value to what they lose. That's an entirely different question to what he [1799] stated. That was my purpose. They carried no item on their books showing that they suffered any loss at all during these different takings.

The Court: I think the objection to the admission of the manager's and president's reports in each one of these annual reports is well taken. I don't think that the opinions therein stated will aid the Court at all. You may have an exception.

Mr. Vitousek: I note an exception, if the Court please.

The Court: So it still remains true, the only parts of those reports that are in evidence are the pages containing the figures taken from the books.

By Mr. Vitousek:

Q. I show you a printed document here, Mr. Spalding, headed "Special Report, 1944, Forty-Sixth Annual Report of Honolulu Plantation Com-

(Testimony of P. E. Spalding.)

pany, for the year ended December 31, 1944." Is that the report of the company?

A. That's a report of the company.

Q. Does it purport to be? A. Yes.

Q. And made up similar to the one, similar to the way these other reports were made up?

Mr. Rathbun: I object to that. It speaks on its face whether it's similar or not.

Mr. Vitousek: If the Court please, we certainly have a right to show with this witness whether this truly reflects the records of the company. It doesn't speak for itself when [1800] you just offer a book. It does reflect the records of the company as a summary of such records, if it does, then it becomes admissible.

Mr. Rathbun: That is not the question you asked.

The Court: Is this something already in evidence?

Mr. Vitousek: No, if the Court please. I notice we went up to 1943. This is the '44 report made up during the year involved here. This is one additional report.

The Court: The witness may answer the question. You may have an exception.

A. Yes.

Mr. Vitousek: Now, if the Court please, we offer this in evidence. We offer this report in evidence. In order that there be no mistake, I want to call your attention to page 13. (Handing book to Mr. Rathbun)

The Court: If your comparison is going to take

(Testimony of P. E. Spalding.)

a few minutes, we are pretty close to another recess time and we can take that in advance.

(A short recess was taken at 10:55 a.m.)

After Recess

Mr. Rathbun: No objection.

The Court: This offer includes the whole report?

Mr. Rathbun: Same objection to that also, of course, to the president's report in the beginning, or whoever it is that shouldn't be in evidence.

The Court: Are you limiting your offer?

Mr. Vitousek: We are urging it for the same reason, if the Court please.

The Court: Let me get that straight. You are offering the whole report? You are going to object to the manager's and president's section of it?

Mr. Rathbun: Yes, for the same reasons as objected to the other exhibits.

The Court: The document may be received on the same basis as the others.

Mr. Vitousek: Excluding the manager's and president's reports?

The Court: Manager's and president's reports.

Mr. Vitousek: Could we have that part of the same series?

The Court: Exhibit 13.

The Clerk: The last one is Exhibit 13-T.

The Court: 13-U.

(The document referred to was received in evidence as Honolulu Plantation Company's Exhibit 13-U.)

(Testimony of P. E. Spalding.)

Mr. Vitousek: That's all.

The Court: Cross-examination?

Cross-Examination

By Mr. Rathbun:

Q. Mr. Spalding, I notice on page 13 of Exhibit 13-U statements at the bottom under the heading "Notes", among others [1802] as number three of those notes headed "Claim to Congress." Are you familiar with that claim and what was done in connection with it? A. Not in detail.

Q. Did you have to do with preparing statements and exhibits in connection with it?

A. No, sir.

Q. Nothing to do with it?

A. No, I had nothing to do except general nature.

Q. Do you know about it?

A. I know of it.

Q. You know they were preparing a claim, preparing the claim? A. Yes.

Q. You saw the claim? A. Yes.

Q. You saw the claim after it was prepared for presenting to Congress? A. Yes.

Q. I will ask you to look at Government's Exhibit 1 for identification and ask you whether or not that was the document that was prepared for filing in Congress and whether or not that pertains to the claim that you mention that I have just referred to on this Exhibit 13-U? (Handing exhibit for identification to the witness.) [1803]

A. Yes, this looks like it.

(Testimony of P. E. Spalding.)

Q. Well, look at it carefully now.

A. Well, I can't go through this in detail.

Q. Well, I'm sorry but you must if you want to testify. I want you to say whether that document was the one that was prepared for filing under this claim that you mentioned in this document? A. To the best of my knowledge—

Q. 13-U.

A. —to the best of my knowledge it is the document.

Q. All right. You haven't even looked at the inside to see who the statements are by either. You'd better look at that. See the signatures, and so forth. That's signed, now, the first statement by Jacobson, president? A. Yes.

Q. You were familiar with that, weren't you, when it was prepared, filed?

A. I wasn't familiar.

Q. You didn't see this claim before it was filed in Congress? A. No.

Q. In the form that it is now? A. No.

The Court: Speak louder.

A. It was completed and prepared in San Francisco and [1804] was filed by—I saw a copy of it after it was completed.

Q. All right. You saw the copy of this document that I am showing you, didn't you?

A. Yes.

Q. To be filed in Congress? A. Yes.

Q. Did they file that in Congress without showing it to you? A. Yes, I think so.

Q. Did they?

(Testimony of P. E. Spalding.)

A. Well, now, I can't—I don't know the exact date when it was filed.

Q. Well, there's been some statement here about a different claim being filed than this one. Let's straighten the mystery out. Was this filed in Congress or wasn't it?

A. I can't answer that question.

Q. Well, who can tell me in your organization?

A. Mr. Jacobson could.

Q. Well, Mr. Jacobson is in San Francisco, isn't he?

A. No, he died last year.

Q. Well, all right. He is not available. Anybody in C. Brewer and Company that can tell me what claim was filed in Congress and whether or not that is it and if it isn't how many changes were made?

A. I can't tell you. [1805]

Q. Well, who can?

A. I don't know.

Q. You are the President of C. Brewer and Company?

A. I am the President of C. Brewer and Company.

Q. And you don't know of anybody in C. Brewer and Company that knew that claim and saw it before it was presented to Congress?

A. Well, this is Honolulu Plantation Company.

Q. I understand. But C. Brewer and Company deal with the manager officers in preparation of that claim?

A. No, Mr. Jacobson was the president of that company.

Q. What did Brewer and Company do?

A. Agent.

(Testimony of P. E. Spalding.)

Q. What did they have to do with the presentation of that claim?

A. They prepared many of the detailed statements in the various offices there.

Q. The claim I'm talking about now.

A. The claim was prepared, as I recall it, was prepared by Mr. Schmutz, who testified.

Q. Did he prepare the statement of Mr. Jacobson?

A. Mr. Jacobson prepared that statement.

Q. All right. Mr. Schmutz didn't prepare that, did he? Who got up the statements that are attached to this, the financial statement as an exhibit attached to Mr. Schmutz' report? [1806]

A. I don't know.

Q. Who would know in C. Brewer and Company whether they were prepared here or in San Francisco?

A. I don't know whether there's anybody in C. Brewer and Company who knows exactly where they were prepared.

Q. Where were the books of the company kept?

A. The books of the company are kept here and duplicates in San Francisco.

Q. Therefore the books of the company here were the books from which this was prepared, were they not, these exhibits attached to Government Exhibit 1 for identification?

A. The books here were used in preparing many of the documents there.

Q. Which ones? A. I can't tell you.

Q. Who in C. Brewer and Company knows?

(Testimony of P. E. Spalding.)

A. I don't know that I can tell.

Q. You can't tell me of anybody who had connection with this in C. Brewer and Company?

A. There were many different ones involved.

Q. Well, name them, please. Preparation of this claim I'm talking about and the exhibits attached to it.

A. Oh, I imagine that Mr. Ewart did some of the preparation on some of the land work, Mr. Ewart.

Q. Who else? [1807]

A. I can't—I don't know who did it. The work was done primarily by Mr. Schmutz.

The Court: You will have to speak louder.

A. The work was done by Mr. Schmutz.

Q. Mr. Schmutz didn't make up the exhibits that are attached here to this document, did he?

A. I assume he did.

Q. You assume that Mr. Schmutz went into your books and made out those statements which appear in Government Exhibit 1 for identification?

A. It was prepared, it was completed and put together in San Francisco.

Q. Well, put together and completed. Now, where was it gotten up before it was put together and completed?

A. There are many different details that were secured.

Q. Well, let's confine ourselves, then, to these details. Where were the documents attached to that, under the heading of "Damage Estimates" on pages 29, 30, 31, 32, 33, 34, 35, 36, 37, 38 pre-

(Testimony of P. E. Spalding.)

pared? A. I don't know.

Q. Do you know who in Brewer and Company would know? A. No.

Q. You have no idea as the President of C. Brewer and Company?

Mr. Vitrousek: Just a moment. This is not proper [1808] cross-examination in the first place. There is nothing in the direct examination in regard to this claim. The witness has testified he doesn't know. Therefore, there can't be a basis for a cross-examination of this witness on it. He had nothing to do with the figures. And these questions have been asked and answered several times. For all those reasons we object to them.

Mr. Rathbun: I'm startled at the statement that there's nothing in the direct about this claim. They have just put in evidence, a document here marked—

The Court: 13-U.

Mr. Rathbun: —13-U, in which it is set forth specifically. I'll read it to your Honor.

“Claim to Congress:

“The Company's enterprise has been seriously damaged through extensive expropriations by the United States Government. Many of the properties shown in the balance sheet at normal book values have had their usefulness and value either impaired or destroyed. The Company has been denied just compensation for all of its damages except in the case of growing crops and certain improvements physically expropriated. Accord-

(Testimony of P. E. Spalding.)

ingly, it has prepared and is presenting a claim for such losses to the Congress of the United States, seeking appropriate relief in the approximate amount of \$3,000,000.00.

“(4) Other Clams:

“The estimated amount to be recovered for loss of growing [1809] crops and fixed assets due to government takings is \$350,000.00. This amount includes recovery of certain direct, indirect or overhead expenses relative to the condemned fields, which expenses have been written off in the year incurred in accordance with the Company’s long established accounting procedure.”

Now, that is the claim that I am asking him questions about, pertaining to this exhibit that we offered in evidence in the plaintiff’s case, and they objected to it.

The Court: I don’t quite get the last part of your statement.

Mr. Rathbun: I offered to waive the propriety of my offering evidence and offered that in evidence, and they objected to it, that claim right there, the Government Exhibit 1 for identification. Mr. Vitousek objected to it and your Honor sustained it properly at that time.

The Court: I don’t think there is any merit to the objection as now stated, particularly in view of Exhibit 13-U, and the witness may answer your questions if he can.

Q. Will you answer the last question, please?

(Testimony of P. E. Spalding.)

Will you state to this Court that you never saw this document? A. No.

Q. Marked Government Exhibit 1 for identification, in the form in which it now appears?

A. I can't say that I have seen this one as it now appears. [1810]

Q. Or a copy of it?

A. Or a copy of it. It may have been approximately this one.

Q. Well, what was it, now, tell me? Was it one approximately like that?

A. No, approximately of this general nature.

Q. Will you state, then, do you want to state from your knowledge approximately whether or not you saw this document or a copy of it?

A. I'll state that I saw a copy or approximate copy of this.

Q. Before it was sent to Washington?

A. No, after it was sent to Washington.

Q. After it was sent to Washington?

A. Yes.

Q. You knew that it was being presented to Congress, didn't you? A. Yes.

Q. And if there was anything incorrect in this before it was presented to Congress, it was your business as the President of C. Brewer and Company, the attorney-in-fact for the Honolulu Plantation Company, as the manager-operator through C. Brewer and Company of the Honolulu Plantation Company's properties, to see that it was correct, was it not? A. No. [1811]

(Testimony of P. E. Spalding.)

Q. It was not? You didn't feel any obligation in that respect at all?

A. No, that was being carried on by the officers of the company itself.

Q. I understand you said that. But you didn't consider any obligation on the part of C. Brewer and Company, being the managing company, managing agent for the Honolulu Plantation Company, to check this and see that it was correct before it was presented to the Congress of the United States?

A. Not personally.

Q. Did anybody in C. Brewer?

A. They may have changed various portions of it.

Q. Who? A. I can't tell you.

Q. Was there anybody who took the responsibility of seeing that that was correct before it was filed and presented to Congress?

A. Mr. Schmutz, who was this—

Q. In C. Brewer and Company? A. No.

Q. Nobody? A. No.

Q. C. Brewer and Company is the largest stockholder of the Honolulu Plantation Company, are they not? A. They are. [1812]

Q. And they were at that time?

A. They were.

Q. And they own a hundred thousand shares of stock? A. They do.

Q. And that's out of a total issue of 250,000?

A. Correct.

Q. And there isn't another stockholder of over

(Testimony of P. E. Spalding.)

15,000 shares individually? A. I don't know.

Q. You don't know that even? A. No.

Q. Did Mr. Kay have anything to do with the preparation of this Government Exhibit 1 for identification?

A. He was concerned with it, of course.

Q. Well, how was he concerned? What did he do in connection with it?

A. I don't know what he did.

Q. You have no knowledge about that?

A. No.

Q. Where was the exhibit attached to this Government Exhibit No. 1 for identification as table 1, which I asked you to look at, prepared, if you know? A. I don't know.

Q. You have no knowledge? A. No.

Q. Did you ever see it?

A. I may have seen it but I have no knowledge.

Q. Well, what is your recollection?

A. Well, my recollection is that I may have seen it. I am not sure.

Q. Don't you think you would have made it your business to see? A. No.

Q. In connection with the filing of this claim?

A. No.

Q. You did not? A. No.

Q. You didn't have much interest in this claim?

A. I did have much interest but in detail of this we employed as competent men as we could to work it up.

Q. You employed Mr. Schmutz as an expert to work up a claim? A. Yes.

(Testimony of P. E. Spalding.)

Q. He did not make that statement, did he, that I asked you about on table 1?

A. I don't know.

Q. You know that, don't you?

A. No, I don't know that.

Q. Who made table No. 2?

A. I don't know. [1814]

Q. Who in C. Brewer and Company would know?

A. I don't know as anybody in C. Brewer and Company would know as to who made the specific tables and the various details.

Q. Weren't there conferences held while that claim was being prepared by representatives of C. Brewer and Company with John Courtney, the lawyer?

A. There must have been.

Q. Well, don't you know that there were?

A. Yes.

Q. Why do you say "there must have been?"

A. Well, isn't that—

Q. That's hedging the question, I think.

Q. All right. There were conferences, yes.

Q. And they were held in Honolulu, some of them, weren't they?

A. Yes.

Q. And you were present at them, weren't you?

A. I don't recall being present at any of the conferences.

Q. Who was present on behalf of C. Brewer and Company, then?

A. Well, Mr. Kay was present at some, Mr. Ewart was present at some.

(Testimony of P. E. Spalding.)

Q. Mr. Ewart is not an executive officer of C. Brewer and Company, is he? [1815]

A. He is an Assistant Secretary of C. Brewer and Company.

Q. Assistant Secretary. Beg pardon. Who else?

A. I don't know who else. The executive staff might have been there.

Q. You testified in a hearing that was had in this courtroom, or the next adjoining courtroom of Judge Metzger, did you not, a couple of years ago as a witness before a Congressional Sub-Committee pertaining to this very claim set forth in that Government Exhibit 1 for identification when John Courtney examined you, did you not? A. Yes.

Q. Didn't you at that time see this claim that I have shown you, Government's Exhibit 1 for identification? A. That was an exhibit in that.

Q. And you went over it pretty carefully before you testified with John Courtney, didn't you?

A. No.

Q. You did not? A. No.

Q. Who else besides Mr. Kay and Mr. Ewart in Brewer and Company might have had to do with those exhibits that I started to ask you about, table 1 and 2? A. Mr. Austin might have.

Q. Do you know whether he did or not?

A. No, I don't. [1816]

Q. Anybody else?

A. I don't know. The manager of the plantation, many different individuals, but just who did—

(Testimony of P. E. Spalding.)

Q. Will you tell me the ones you can remember, is what I want?

A. My answer would have to be that I do not know what was prepared by any individual in connection with that claim.

Q. I didn't ask you that. I asked you who might have done it in C. Brewer and Company, to name me the people. Now, you have given a list. Is that all of them that you can recall?

A. That's all that I can recall.

Q. Now, would your answer be the same in regard to all of the exhibits that are attached to this as tables?

A. That's right.

Q. And otherwise following the table No. 2 that I asked you about?

A. Yes.

Q. Now, C. Brewer and Company have been the manager-agent for the Honolulu Plantation Company for how long?

A. They have been the agent of Honolulu Plantation Company for, since before my time in Brewer and Company.

Q. Since before 1924 even?

A. Yes.

Q. They have full control, as such agent, of the operation [1817] of the company, the selling, the books, keeping of the books, buying necessary supplies and all those things, do they not?

A. No.

Q. What?

A. No.

Q. Which ones of those do they not have charge of?

A. They are the advisors of the plantation in

(Testimony of P. E. Spalding.)

the carrying on of its operations; as a manager employed by the company who is the manager of the plantation, and C. Brewer and Company as an agent acts as an advisor to that manager.

Q. Who does the selling?

A. Beg pardon?

Q. Who does the selling?

A. Selling of sugar?

Q. Yes. A. That's part of the agent.

Q. C. Brewer and Company?

A. Yes, the agent to sell sugar, to negotiate land leases.

Q. Just answer my question, please. Who has to do with the buying of raw sugar?

A. That has been done by C. Brewer and Company.

Q. The books are kept—

A. Let me correct that. The raw sugar that was purchased from Waimanalo was purchased by C. Brewer and Company. The raw sugar purchased from C. and H. was purchased by Honolulu [1818] Plantation Company in San Francisco.

Q. That's because they are located at Crockett, isn't it? A. No.

Q. What? Or in California?

A. C. and H. had headquarters in California and Honolulu Plantation Company's home office is California.

Q. Who are the stockholders of this C. and H. Company? A. Plantations.

Q. The plantations located in the Territory of Hawaii, isn't that right?

(Testimony of P. E. Spalding.)

A. About 28 of them, I think there are.

Q. How many of them are located in the Territory of Hawaii?

A. All of the plantations that are shareholders of Crockett are located in the Territory.

Q. That's a corporation organized in a sort of a co-operative way for the benefit of all the plantations?

A. For the benefit of the owners.

Q. Well, the owners are the plantations?

A. Not all of the plantations own stock in C. and H.

Q. The plantations that do own stock are all in the Territory of Hawaii?

A. That's right.

Q. And Honolulu Plantation is one of them, isn't it?

A. No. [1819]

Q. Who does own the stock as far as Honolulu interest is concerned?

A. In C. and H.?

Q. Brewer and Company?

A. No. There is no—

Q. Brewer and Company owns no stock?

A. In C. and H.?

Q. Yes.

A. No stock.

Q. Honolulu Plantation owns none?

A. None.

Q. Does Oahu Sugar own any?

A. Oahu Sugar, yes.

Q. Ewa?

A. Ewa.

Q. What other plantations on the Island of Oahu?

A. Wailua, Kahuku, Waianae.

Q. Any others?

(Testimony of P. E. Spalding.)

A. That own stock in C. and H., no. Waimanalo owns no stock.

Q. Any of the other islands, what companies on the other islands own stock in it?

A. Is this about C. and H.?

Q. Yes.

A. Well, now, if I can get a list of the plantations I [1820] can give them to you.

Q. Well, I haven't got a list of the plantations. I'm asking for your recollection.

A. My recollection, out in Maui there's Pioneer, Hawaiian Commercial, Maui Agricultural, and Wailuku that own stock in C. and H. On the Island of Hawaii, Onomea, Pepeekeo Sugar Company, Laupahoe, Kaiwiki, Hamakua, Kohala, Hawaiian Agricultural Company, Olaa, Waiakea. And on Kauai there's Kekaha, Waimea, McBryde, Koloat, Grove Farm in Lihue, that own stock in C. and H.

Q. Is that all that you can recollect?

A. That's all that I can recollect.

Q. What is the purpose—when was this C. and H.—what is the proper name?

A. California and Hawaiian Sugar Refining Corporation.

Q. When was it incorporated?

A. I think it was 1903 or 4. I don't know just when.

Q. And what was the purpose of its coming into existence, if you know?

(Testimony of P. E. Spalding.)

A. To refine raw sugar of the owners and market it.

Q. Refine raw sugar of the owners who grew sugar in the Territory of Hawaii?

A. And to market the refined sugar on the mainland.

Q. Was there any other refiner of any of these companies who were stockholders who refined raw sugar? Was there any of [1821] them that refined raw sugar at the time this company came in existence? A. Of these shareholders?

Q. Yes.

A. None of them refined raw sugar.

Q. After that the Honolulu Plantation Company put up a plant and refined sugar?

A. No, I think Honolulu did it before.

Q. All right. A. About the same time.

Q. Honolulu Plantation is the only refinery in the Territory of Hawaii?

A. They are the only refinery. Maui Agricultural Company has produced a small quantity through a suchar process.

Q. What proportion of the refining is done? Would that be inconsequential?

A. In the Territory?

Q. The one that you named.

The Court: Maui?

A. Maui Agricultural? They produced around five, six, seven thousand tons a year.

Q. They get this sugar from the island on which they are located? A. Yes.

(Testimony of P. E. Spalding.)

Q. They don't refine any sugar from the Island of Oahu? [1822] Now, this California and Hawaiian Sugar Company, Refining Company—strike that. Is there any reason why Honolulu Plantation Company could not obtain raw sugar from these other plantations on the Island of Oahu for the purpose of refining it in their mill at Aiea?

A. Well, they could probably obtain sugar to a limited extent, as long as that sugar was sold within the Territory here and not in competition with the owners of the sugar. Their refined sugar is on the mainland.

Q. What do you mean by "limited extent?"

A. To whatever they were able to market in the Territory, what they needed.

Q. In other words, did Honolulu Plantation compete with the California and Hawaiian Sugar Refining Company?

A. Before the war it did.

Q. During the war?

A. No. Couldn't ship any sugar out of here during the war.

Q. They didn't compete?

A. Not during the war.

Q. Now, the sale that's been put through that you mentioned, the sale was to Oahu Sugar Company, was it not, on the face of it?

A. That's correct.

Q. And one of the terms of the sale, is it not, is that [1823] this California and Hawaiian Sugar Refining Company will take over and buy the mill of the Honolulu Plantation Company?

(Testimony of P. E. Spalding.)

A. That's the understanding, that they will buy the refinery. That's my understanding, that they are buying the refinery site and the refinery to operate as a refinery.

Q. Part of the sales agreement, isn't it?

A. Insofar as Honolulu Plantation is concerned, Honolulu Plantation only had a direct dealing with the Oahu Sugar Company. But Oahu Sugar Company's arrangement with C. and H., I don't suppose I could say what that it.

Q. Well, it's been in the papers?

A. Well, whatever is in the papers is probably correct.

Q. Well, the papers stated that part of the deal was that California and Hawaiian Sugar Refining Company was to take over the mill when there was a definite amount allocated for that purpose, \$1,250,000, if I recall the figures correctly.

A. That's correct.

Q. Now, what was the purpose of the California and Hawaiian Sugar Refining Company in buying this mill? A. To produce refined sugar.

Q. Where will they get this sugar from, on these islands, Territory of Hawaii? A. Yes.

Q. They expect to do it at a profit, not at a loss, don't they? [1824] A. They hope to.

Q. Has that been a profitable enterprise, the California and Hawaiian Sugar Refining Company?

A. It's a cooperative and it returns to the plantations whatever the net results are.

Q. They aim to have something to return to them, don't they, as stockholders?

(Testimony of P. E. Spalding.)

A. Yes, they try to, but their return is on the sugar.

Q. Has it been a successfully operated company? A. I believe so.

Q. Now, this exhibit that's been marked in evidence as Exhibit 13-U, I notice under or on page 18 and 19 of that document, under a heading "Permanent Improvements and Property Accounts, December 31, 1944," two items at the top. One is real estate, fee simple, \$182,214.85. And under that is real estate, leasehold, \$267,864.78. Was that ever carried previous to 1944 on this annual report in that manner?

A. I assume that it was. If I can see some of the other exhibits, I'll soon tell you.

Q. I will hand you Exhibit 13-S and 13-T, which are for the years '42 and '43.

In 1943 they have real estate, fee and leasehold combined.

Q. They have it combined?

A. As one item. [1825]

Q. That was the practice in all of the reports that are in evidence in this case, was it not?

A. Yes, in '42 it shows the same thing.

Q. Isn't that the same in all of these exhibits, without showing them to you? Isn't '44 the first time that they split them that way between fee and leasehold?

A. That apparently is the first time, yes.

Q. Well, I don't want to confuse you. If you want to look at those documents, you can.

(Testimony of P. E. Spalding.)

A. If you will show me that they are that way, I am willing to accept it.

Q. I am asking you a question and you will have to look at them yourself.

A. Let me look at them. '39 is the same way.

Q. I will have them in order. Just a minute. Now, there, they are there, all of them. Now, what do you say, whether or not that practice was ever followed before 1944?

A. That is not in the 25 reports at all. Apparently they are all carried, they were not separated before, the fee and leasehold were not separated before.

The Court: It has become necessary and advisable to take a recess for the day. We will adjourn for the day and if you are all right, we will go ahead tomorrow morning at nine o'clock.

Mr. Vitousek: Yes.

The Court: All right.

(The Court adjourned at 11:53 o'clock, a.m.)

Honolulu, T. H., January 9, 1947

The Clerk: Civil No. 514, United States of America versus 257.654 acres of land, and Civil Nos. 521, 525, 527, 529, 532, 533, 535, 536, 540, 544, 548 and 684, for further trial.

The Court: Are the parties ready?

Mr. Vitousek: Ready.

PHILIP EDMUND SPALDING,

a witness in behalf of the Defendants, having previously been sworn, resumed and testified further as follows:

Cross-Examination—(Continued)

The Court: Mr. Spalding, you are mindful of the fact that you are still under oath?

The Witness: Yes, sir.

The Court: You may proceed.

By Mr. Rathbun:

Q. Mr. Spalding, showing you Government Exhibit 1 for identification, and calling your attention to a list of stockholders of Honolulu Plantation Company as of December 31, '44, did you ever see that? A. I don't recall.

Q. Will you look at it and see whether it is correct? You have knowledge of the stockholders, don't you? [1827]

A. Well, I have no knowledge of their holdings.

Q. You have no knowledge of their holdings? You have knowledge of the Brewer and Company holdings, don't you? A. Yes.

Q. Will you look on that statement to see if they are correctly reflected?

A. Yes, that's Brewer and Company holdings.

Mr. Vitousek: What was the answer?

A. That's the Brewer and Company holding.

Q. How much?

A. A hundred thousand nine hundred and sixty-two shares.

Q. What is the total capitalization of the Hon-

(Testimony of P. E. Spalding.)

Honolulu Plantation? A. Five million dollars.

Q. How many shares of stock?

A. Two hundred fifty thousand.

Q. Two hundred fifty thousand shares?

A. Yes.

Q. Is Matson Navigation Company interested as a stockholder?

A. Not that I know of. They would be shown if they were.

Q. You don't know?

A. No, I don't think they are. As a matter of fact, I'm pretty sure they are not.

Q. What is the Matson Securities Company, do you know?

A. Oh, I think the Matson Securities Company is the— [1828] represents the holdings and ownership of Mrs. Roth.

Q. Mrs. Who? A. Roth.

Q. Who is Mrs. Roth?

A. Mrs. William Roth.

Q. Is she connected with the Matson Navigation Company?

A. Her husband is the President or Chairman of the Board, I think.

Q. Now, C. Brewer and Company, of which you are President, collected commissions from the Honolulu Plantation Company for their services as agent, did they not? A. Yes.

Q. Commissions for the year 1944, do you know how much they were for that year?

A. No, I do not.

(Testimony of P. E. Spalding.)

Q. What would you say that the \$114,809.86 as shown on the blue sheet, first page of the attached sheet to the Exhibit 13-U, that that properly reflects the amount of commissions received by Brewer and Company for that year?

A. It says commissions to Honolulu agents, \$114,809.86. That's—

Q. That's Brewer and Company?

A. That's Brewer and Company. We are the Honolulu agent.

Q. Did that include commissions upon the amounts paid by the U. S. Department of Agriculture as compliance payments? [1829]

A. Certainly.

Q. Well, yes is your answer? A. Yes.

Q. Do you know what the compliance payments for the year '44 were? A. No, I do not.

Q. Have you any idea as president of the company?

A. No. The compliance payments are payments based on the sugar produced.

Q. I know what they are. I asked you if you have any knowledge of the amount of commission?

A. No.

Q. Or the amount that was paid?

A. No, I do not. It was all incorporated in that one figure.

Q. But they did collect a commission on it?

A. Yes.

Q. C. Brewer and Company? A. Yes.

Q. Now, in testifying that the taking of lands

(Testimony of P. E. Spalding.)

involved in these cases that are being tried here had an effect upon the value of the remaining properties of the Honolulu Plantation Company, you had in mind the leases of the company, didn't you?

A. I had in mind the whole enterprise.

Q. Well, you had in mind the leases of the company? [1830]

A. As a part of the whole operation, yes.

Q. Then you did have those in mind?

A. Yes.

Q. The Damon leases, you are familiar with those, weren't you? A. I negotiated them.

Q. And you know the acres that were involved at the time of these takings?

A. The acreage in these particular—

Q. In the Damon leases?

A. That was taken at that time. I don't know. I'd have to refresh my memory.

Q. Will you refresh your memory, please?

A. If there is some document here.

The Court: Shown on Exhibit 12.

The Witness: Exhibit 12?

The Clerk: Honolulu Plantation Exhibit 12.

A. 595.01 acres in this list.

Q. You say that that's all the acres that were involved that were leased from the Damon Estate that were taken in the proceedings on trial?

A. Well, I'm taking this exhibit.

Q. I don't know what you are taking. I'm asking you, as the President of C. Brewer and Company, the managing agent.

(Testimony of P. E. Spalding.)

A. If this is correct, this is on the statement.

Q. Well, I don't know whether it's correct.

A. Well, I can't state from my own memory the acreage.

Q. You don't know?

A. I don't know other than approximately.

Q. You negotiated all these leases?

A. I negotiated the leases.

Q. You are familiar with the fact that you are making a claim for the deterioration on the balance of property less than the amount taken in these 21 cases?

A. Yes.

Q. Still you don't know the acreage?

A. I don't know.

Q. On the Damon Estate?

A. Not the exact acreage.

Q. Do you know approximately?

A. Yes, approximately 600 acres.

Q. And that's all, no more?

A. That's what, that's my understanding, approximately 600 acres.

Q. Will you look at the document, Exhibit 9-K, and tell me how much of the property involved in 9-K was taken in these proceedings involved in this trial?

A. You want me to figure this out with pencil and paper?

Q. I'd like to have you give me your knowledge about it. That's what I want. [1832]

A. The total area in this lease is 1,451.56 acres. All I can assume is that in this taking this exhibit

(Testimony of P. E. Spalding.)

correctly determines the total amount of the takings that are in this trial, some 600 acres.

The Court: Exhibit 12?

A. Exhibit 12 shows 595.01, which I am perfectly willing to take as correct.

Q. 595.01 is the total amount of the acreage that was taken from the property covered by that lease in these cases now on trial, is that right?

A. Yes.

Q. Are you familiar with the signature of Mr. C. F. Jacobson, the President of the Honolulu Plantation Company? A. Yes.

Q. Will you look at the signature on page 12 of Government Exhibit No. 1 and tell me whether or not that is his signature?

A. Yes, that is, I would identify it as his signature.

Q. Who is Mr. Charles M. Merriam in C. Brewer and Company?

A. Mr. Merriam was the manager of the land department. He was retired in the end of '43 due to ill health.

Q. He had full charge of the leases?

A. Well, he didn't negotiate leases. He didn't have authority to negotiate leases. [1833]

Q. What were his duties?

A. He was in charge of the land department.

Q. Well, what do you mean by that?

A. He had charge of all the documents and in the calculation of the rentals to be paid and in the paying of the rentals and in the general oversight of the lands.

(Testimony of P. E. Spalding.)

Q. What do you mean by "general oversight?"

A. Just what I said.

Q. You can't explain it any further than that what an oversight mean in his duties?

A. Other than his duties were to examine the documents, to keep them properly corrected, to notify us when the leases were due to expire, and to bring to the attention of the officers the necessity for renegotiation of leases or offers of sale of property or purchase, carry out the details of any transactions that were negotiated by the officers.

Q. And did he operate under your supervision and direction? A. Yes.

Q. He was authorized to write letters pertaining to the real estate and the leases that the company owned or held?

A. Any ordinary letters, ordinary business transactions.

Q. Did you look at all the letters that he wrote?

A. No.

Q. Now, in connection with your statement that the taking [1834] of the land involved in these cases now on trial had an effect upon the remaining property of the Honolulu Plantation Company, did you assume that as to this 595 acres that you have just testified about it was a piece of property upon which the Honolulu Plantation Company had a lease in 1944? A. Yes.

Q. What did you base that upon?

A. Based that upon an offer in writing made by the Trustees of the Damon Estate to Honolulu Plantation, which I accepted in writing.

(Testimony of P. E. Spalding.)

Q. You mean you accepted in writing? When you say that you refer to the letter that you wrote to the Trustees under the Will of Samuel Mills Damon, deceased, under date of October 21, 1940, which is attached to Honolulu Plantation Exhibit 9-K in this case, is that right?

A. That letter and their offer.

Q. Yes. Which is also attached?

A. Which is also attached.

Q. Under date of? A. October 18.

Q. October 18, 1940? That's what you mean by your statement? A. That's what I mean.

Q. You accepted it?

A. That, I accepted it. [1835]

Q. Is there any other correspondence except those two letters that took place pertaining to this lease?

A. Yes, about, I think it was in the spring of the following year we notified them that we have been spending considerable monies in the improvement of these properties and would ask that they proceed with the preparation of the leased document.

Q. Have you those letters?

A. I haven't them with me, no.

Q. What?

A. I haven't them with me. They are certainly in our files.

Q. Well, you haven't them with you?

A. No. My recollection is that it was in May

(Testimony of P. E. Spalding.)

of the following year. We were spending a great deal of money in replanting the whole area.

Q. I didn't ask you that, did I? Please, sir.

A. Well, I didn't know.

Q. Well, you know very well that I didn't, don't you? I asked you about a letter.

A. I was merely explaining the reason why we had written the letter.

Q. Well, I wasn't asking the reason. You have counsel here that can ask you that.

A. All right. [1836]

Q. On this letter of October 21, 1940, that you wrote to the Trustees of the Damon Estate, you state that we will prepare a tentative form of lease for submission to you. Did you prepare such a lease? A. Yes.

Q. Will you look at that document and see whether or not that is the lease that was tendered by the Honolulu Plantation Company pursuant to that letter? (Showing a document to the witness)

A. That is a preliminary draft of a lease.

Q. Well, did you ever submit any other?

A. No.

Q. All right, then that is the only thing that you ever submitted under that clause of that letter, is it? A. Yes.

Q. And that's it, is it? Look at it carefully.

A. I don't recognize these notations that are—

Q. Well, I didn't ask anything about the notations. Just the lease itself. Disregard the notations that are pinned on there?

(Testimony of P. E. Spalding.)

A. Yes, that's the lease.

Mr. Vitousek: May I see it? I don't think these notations should be torn off at this time. I'd like to see it as it was.

Mr. Rathbun: I know you'd like to but these happen to be personal notations of ours. I asked him about the document only, [1837] that I asked him about.

Q. In connection with that document that I have just shown you, you wrote the letter that is attached to it?

Mr. Vitousek: When documents are offered, the attorney has a right to look at them. I have previously shown counsel all the documents that I offered.

Mr. Rathbun: If you are offering them. I have a right to identify documents prepared for my office.

Mr. Vitousek: Well, I have never seen it handled that way.

Mr. Rathbun: Well, you missed a lot in life.

Mr. Vitousek: Counsel has a right to look at documents before they are presented to the witness.

Mr. Rathbun: When I get through identifying this letter. You're wrong on this position.

Mr. Vitousek: I'm not wrong in my position.

Mr. Rathbun: Will you let me finish, please.

The Court: Just a minute. There's no need for this cross talk.

(Testimony of P. E. Spalding.)

Mr. Vitousek: I request that the document be shown to opposing counsel.

The Court: I haven't any power to require its being shown until it is offered in evidence. Proceed.

Q. In independence of the pencil notations which are upon the letter which I now show you attached to the lease that [1838] you have just identified, a copy of a proposed lease, is a letter written by Charles H. Merriam, under date of November 29, 1940, to the Trustees under the Will of Samuel Mills Damon, deceased, is there not?

A. Yes.

Q. Disregarding the memorandum or the memoranda that are attached to it in typewriting on the green and yellow slips, and disregarding the pencil notes, that's just the way it was sent, wasn't it, to the Trustees of the Damon Estate?

A. Yes.

Q. You may look at those if you care to. I haven't any objection to it. But they are no part of it. It wasn't anything said by you, that green slip?

A. No.

Q. That green and yellow slip attached?

A. No.

Q. Put on by someone else.

The Court: You will have to speak louder, Mr. Spalding. Your voice doesn't carry the answer. Your answer to the last two questions was No?

A. No. Yes.

Mr. Rathbun: I ask that the letter of November

(Testimony of P. E. Spalding.)

29, 1940, with the limitations which I stated in regard to the memoranda attached to it, and the form of proposed lease attached to it be marked as Government's Exhibit for identification 2 and 3 [1839] respectively at this time.

Mr. Vitousek: Now may I see it?

The Court: You may now see it. (Document referred to is handed to Mr. Vitousek)

Mr. Vitousek: The request is that they be marked for identification?

The Court: That is right; excluding the attached yellow and blue slip they may be marked for identification.

Mr. Rathbun: And the pencil notations.

The Court: And excluding the pencil notations. As what, Mr. Clerk?

The Clerk: The letter is U. S. Exhibit No. 2 for identification and the proposed form of the lease is U. S. Exhibit No. 3 for identification.

(The documents referred to were marked
"U. S. Exhibit No. 2 for identification" and
"U. S. Exhibit No. 3 for identification.")

By Mr. Rathbun:

Q. Now, this Mr. Charles H. Merriam that signed this letter marked Government's Exhibit No. 2 for identification is the same Mr. Merriam that you have just been testifying about?

A. Yes.

Q. And did you see that lease that is attached to that letter previous to the time that it was sent?

(Testimony of P. E. Spalding.)

A. I'm sure I did, but I can't recollect. [1840]

Q. And you had knowledge of the letter that accompanied it, did you? A. Yes.

Q. And you authorized, you knew that Mr. Merriam wrote that letter, did you not?

A. Yes.

Q. I show you a carbon copy of a letter dated November 29, 1940, written to the Trustees under the Will of Samuel Mills Damon, deceased, by C. Brewer and Company, by Mr. Charles H. Merriam, and ask you whether or not you had knowledge of that letter? (Showing a letter to the witness)

A. That is the same letter that is attached to this lease. That is a copy of it.

Q. Maybe you're right. That's right. I show you a letter dated May 5, 1941, written to the Trustees under the Will of Samuel Mills Damon, deceased, by C. Brewer and Company, by Mr. H. T. Kay, Vice-President, and ask you whether or not you had knowledge of that letter? (Showing a letter to the witness)

A. Yes, that's the letter to which I just referred in my testimony.

Q. When did you refer to that?

A. You asked me if there was additional correspondence, and I referred to a letter written some six months.

Q. That's the correct copy of the letter, is it?

A. To the best of my knowledge, it is. [1841]

(Testimony of P. E. Spalding.)

Q. You had knowledge of it when it was written?

A. But I can't remember—I would say it is a correct copy.

Q. Well, I'm showing you the letter now and asking you whether or not that's a correct copy of that letter that was sent?

A. To the best of my knowledge, it is.

Mr. Rathbun: I ask that that letter of May 5, 1941, a copy of it, be marked Government's Exhibit No. 4 for identification. (Showing letter to Mr. Vitousek)

The Court: It may be so marked.

(The letter referred to was marked "U. S. Exhibit No. 4 for identification.")

Q. I show you another letter, dated May 12, 1941, written by—this is a copy, carbon copy—with J. W. initials at the bottom, and underneath it typewritten J. Waterhouse, a trustee, directed to C. Brewer and Company, attention Mr. H. T. Kay, Vice-President, and ask you whether or not you had knowledge of that letter?

A. Yes, I remember that.

Q. That's a correct copy of the letter that purports to be a copy of? A. Yes.

Mr. Rathbun: I ask that this letter, excluding the blue slip which is attached to it, be marked Government's Exhibit [1842] No. 5 for identification. (Handing letter to Mr. Vitousek)

The Court: It may be so marked.

(Testimony of P. E. Spalding.)

(The letter referred to was marked "U. S. Exhibit No. 5 for identification.")

Q. I show you a carbon copy of a letter dated August 15, 1941, written to C. Brewer and Company, Agent, Honolulu Plantation Company, by John Waterhouse, E. H. Wodehouse, and John E. Russell, Trustees of the Estate of Samuel M. Damon, and ask you if you had knowledge of that letter, the original?

A. Yes, I have knowledge of this letter.

Q. And that letter, the original of it is in the possession of C. Brewer and Company, is it?

A. It should be.

Mr. Rathbun: I ask that this letter be marked for identification, Government's Exhibit No. 6, disregarding the slip attached to it on the yellow paper in typewriting. (Handing letter to Mr. Vitousek)

The Court: It may be so marked.

The Clerk: U. S. Exhibit 6 for identification.

(The letter referred to was marked "U. S. Exhibit No. 6 for identification.")

Q. I show you a letter, carbon copy of a letter written by Honolulu Plantation Company by H. T. Kay, Vice-President, dated December 16, 1941, addressed to S. M. Damon Estate, and ask you whether or not you are familiar with that letter? [1843]

A. Yes, I am familiar with it.

Q. That's a correct copy of a letter that was written to the Damon Estate by Honolulu Plantation Company through C. Brewer and Company?

(Testimony of P. E. Spalding.)

A. Yes.

Q. On that date? A. Yes.

Mr. Rathbun: I ask that that be marked for identification as Government's Exhibit 7.

(The letter referred to was marked "U. S. Exhibit No. 7 for identification.")

Q. I show you a letter dated November 11, 1943, written by C. Brewer and Company by Charles H. Merriam, Manager, Land Department, to the Public Works Officer, Commandant, Navy Number 128, care of Fleet Post Office, San Francisco, California, and ask you whether or not you had knowledge of that letter? A. No.

Q. Never had any knowledge of it?

A. I didn't know that was written.

Q. Did you ever know that it had been written?

A. Yes, I learned about it a few months ago.

Q. You learned about it a few months ago?

A. I didn't know anything about it being written.

Q. It's signed by the same Charles H. Merriam that you have testified about here? [1844]

A. Yes.

Mr. Rathbun: I ask that that letter be marked for identification, Government's Exhibit No.—

The Clerk: Eight.

The Court: It may be so marked.

(The letter referred to was marked "U. S. Exhibit No. 8 for identification.")

Q. I show you a letter dated September 16, 1943, written by C. Brewer and Company, by Char-

(Testimony of P. E. Spalding.)

les H. Merriam, Manager, Land Department, to the Commandant, Fourteenth Naval District, Navy Number 128, care of Fleet Post Office, San Francisco, California, and ask you whether you had knowledge of that letter?

A. No, I don't. I didn't know anything about that letter.

Q. Did you ever have knowledge of it previous to today? A. Yes.

Q. When? A. In the last few months.

Q. Where did you find the letter in the last few months?

A. It must have been in our files.

Q. Well, is that your knowledge about it?

A. That's my knowledge.

Q. How did you happen to get it? How did it happen to be called to your attention?

A. Well, now, I don't know why or how it was called to my attention but it was. [1845]

Q. You haven't any recollection about that at all?

A. About why it was called to my attention?

Q. Yes.

A. Unless it was in connection with these proceedings.

Q. Well, I'm asking for your recollection.

A. I have no recollection.

Q. No recollection whatever as to how you happened to have that letter called to your attention?

A. That's the best of my recollection what I have said.

(Testimony of P. E. Spalding.)

Q. You just have no recollection?

A. No recollection it was called to my attention.

Q. And how was the other letter, marked—where is this marked?

The Clerk: Which one is that?

Mr. Rathbun: It should be 7 shouldn't it?

The Court: That's December 16, 1940?

Mr. Rathbun: September 16.

The Clerk: Did you get that one in yet? Eight is the last one.

Mr. Rathbun: They are all in that I have handed to you.

The Clerk: You haven't offered it yet.

Mr. Rathbun: But you had the other one.

The Clerk: Eight.

Q. Now, the letter of September 16 which I am now showing [1846] you, which isn't yet marked, that's the one that you say you can't have any recollection as to how it was called to your attention? You do not have any such recollection at this time?

A. It's the same as the other one that was called to my attention some time in the last few months.

Q. Now, you mean the same as the other one, you are referring to U. S. Exhibit No. 8 for identification? A. Yes.

Q. Dated November 11, '43? A. Yes.

Q. And as to neither one of those can you re-

(Testimony of P. E. Spalding.)

member at all how those letters happened to be called to your attention?

A. Other than what I have testified, that they were called to my attention some time in the last few months.

Q. But for the occasion, you don't remember and haven't any recollection at all?

A. Other than it was in connection with these proceedings.

Q. Well, is that when it was called to your attention?

A. That's when it was called to my attention.

Q. That's your recollection now?

A. Yes.

Q. What were you needing these letters for in connection with these proceedings?

A. The attorneys, in preparing for the case, apparently dug them up. [1847]

Q. Well, that was your recollection?

A. I don't know anything about them other than what they were called to my attention.

Q. Who called your attention to them?

A. I can't recollect who that was.

Q. You can't even recollect that? A. No.

Mr. Rathbun: I'd like to have your Honor read those letters. (Handing two letters to the Court)

The Court: One of them has not yet been marked.

Mr. Rathbun: I now ask that the letter of September 16, 1943, written to the Commandant

(Testimony of P. E. Spalding.)

by Charles H. Merriam, be marked as Government's Exhibit.

The Clerk: This will be 9.

Mr. Rathbun: Nine for identification.

The Court: It may be so marked.

(The letter referred to was marked "U. S. Exhibit 9 for identification.")

Q. Do you know whether or not, Mr. Spalding, these documents marked Government's Exhibits 8 and 9 for identification were ever called to the attention of the Congressional Committee before whom you were presenting a claim? A. No.

Q. On account of these takings? A. No.

Q. You don't know anything about that?

A. No.

Q. Did you suggest to anybody that those ought to be called to their attention?

A. I knew nothing about those letters.

Q. You said you knew about them.

A. Some two or three months ago.

Q. After the hearings?

A. Long after the hearings, long after they were written.

Q. Isn't that proceeding still pending?

A. In Congress?

Q. Yes.

A. As I understand it, there was a bill introduced in the last Congress which was passed by the House, went to the Senate and the Congress expired, so there is no act before the Congress.

Q. Isn't it the intention of the company to

(Testimony of P. E. Spalding.)

present that claim to Congress again in the new Congress? Haven't you got a lawyer in Washington that is supposed to do that for you?

A. Yes, sir.

Q. Have you told him anything about these letters yet?

A. He knows all about the letters.

Q. When did he learn about them?

A. I don't know, but it must have been—

Q. How do you know he learned about them?

A. It must have been subsequent to that proceeding here.

Q. Well, what is your recollection about it?

A. Oh, I can't testify for him as to what he knew and what he didn't know.

Q. You can testify as to what you know he should know, can't you?

A. No, no, I can not.

Mr. Vitousek: He can't testify as to what a man should know. He can testify as to what he knows and what he has information on. We object to the question.

The Court: Go ahead. There were three people talking at once that time.

Q. Did you or anyone else, Mr. Spalding, suggest to your attorney that these letters, marked Government Exhibits 8 and 9, should be called to the attention of the Congressional Committee to whom you were presenting a bill and to whom you proposed to tender one in connection when the new Congress convenes?

A. I did not.

(Testimony of P. E. Spalding.)

Q. Do you know anybody else in C. Brewer and Company that did? A. No.

Q. You'd be apt to have knowledge of it after your attention was called to it if that had been done? [1850] A. Yes.

Q. After you saw these letters?

A. After I saw the letters I probably would have.

Mr. Rathbun: Now, as to the letters here which are originals, if your Honor please, may it be understood that we may substitute copies for them when we can have them prepared? Some of these don't belong to us.

The Court: Yes, copies may be substituted. We have arrived at the time for our first recess and it will be well to take it at this time.

(A short recess was taken at 10:05 a.m.)

After Recess

By Mr. Rathbun:

Q. I show you, Mr. Spalding, a letter dated January 3, 1943—also some pencil notations on this—written to Vice-Admiral Robert Lee Ghormley, U. S. Navy, Commandant, Fourteenth Naval District, Pearl Harbor, Oahu, Territory of Hawaii, by Honolulu Plantation Company, by you, its attorney-in-fact, and ask you whether or not you wrote that letter with the documents that are attached to it? (Handing a document to the witness)

A. I remember the letter very distinctly.

(Testimony of P. E. Spalding.)

Q. Well, that's fine, but did you write it?

A. And the documents which I had prepared.

Q. You wrote the letter, did you? [1851]

A. Yes, I had it written.

Q. Well, what do you mean you had it written, now?

A. Well, I don't—I use a stenographer and typewriters.

Q. You dictated and signed it?

A. I signed it.

Mr. Rathbun: I ask that that be marked Government's Exhibit whatever the next one is.

The Court: Ten.

The Clerk: U. S. Exhibit No. 10.

(The document referred to was marked "U. S. Exhibit No. 10 for identification.")

The Court: The pencil notations you have referred to, you have erased?

Mr. Rathbun: Yes, I have erased those.

Mr. Vitousek: As I understand, it includes the attached exhibits.

The Court: That's my understanding.

Mr. Rathbun: Yes, with the documents attached.

The Court: The letter plus the attached documents.

Q. I show you a carbon copy of a letter dated January 12, 1944, addressed to C. Brewer and Company, purporting to have been written by Robert L. Ghormley, Vice Admiral, U. S. Navy, Commandant, Fourteenth Naval District, on that

(Testimony of P. E. Spalding.)

date of January 12, 1944, and ask you whether or not C. Brewer and Company received the original of that letter? [1852]

A. Yes, they received the original of that letter.

Mr. Rathbun: I ask that this be marked for identification, Government Exhibit No. 11.

The Court: It may be marked for identification.

(The letter referred to was marked "U. S. Exhibit No. 11 for identification.")

Q. Now, again showing you Government Exhibit No. 1 for identification, will you tell me whether or not you have in your possession a copy of that document, meaning by you, yourself or C. Brewer and Company?

A. Well, I can't say that we have a copy of this document as it is prepared.

Q. Have you a copy of the document that was filed with Congress, with the Congressional Committee of Congress pertaining to your claim?

A. I believe we have.

Q. Well, I will ask you to produce it.

A. Now?

Q. If you can send for it, I'd like to have it produced before you are through with your cross-examination.

The Court: Can you arrange to send for it?

Mr. Vitousek: If the Court please, I don't know what the question was.

The Court: He asked him if he could send for it, he asked him to produce it while he was still under cross-examination [1853] and asked if he

(Testimony of P. E. Spalding.)

could send for it, and the witness said he could. Can you arrange to send for it?

Mr. Vitousek: Well, if the Court please, may I make a statement to counsel? I have a copy but I have not yet been able to find out from anyone if it is the copy that was filed. Now, I don't even know whether it compares with this one or not. I have a copy myself. I took it. I have it in my files here.

The Court: In other words, you have in your possession a copy that Mr. Spalding would send for?

Mr. Vitousek: I don't know. I presume so. I didn't get it from Mr. Spalding.

The Court: Supposing you show it to him and see if that is the one that he would send for?

Mr. Vitousek: I am informed by Mr. Kay that this one here is a different one from what they have in the office. This is the one I have in my files, marked "H. T. Kay." He informs me this is the one that was in the office, which Mr. Kay is producing.

The Court: Will you show it to him?

Mr. Vitousek: I don't know anything about it.

The Court: Show it to Mr. Spalding and let him decide which one he would send for, if he can.

The Witness: I would send down for one that looks like something like this. Whether it would be the same one or not, [1854] I don't know.

Mr. Rathbun: Well, I'd say it's about time you

(Testimony of P. E. Spalding.)

were finding out. You knew something about the copy that you filed with Congress.

The Witness: The company filed with Congress, not I. This one looks much the same. (Witness has in his hands two documents, one, Government Exhibit 1 for identification, and another looking similar to it.) (Mr. Vitousek is holding a third document, similar looking to the other two.) I think this one is like I would send for. It looks much the same. That's as near as I can come to identifying it.

The Court: "This one" means a document that appears similar, exteriorly at least, to Exhibit 1 for identification.

Q. Then would you say that Government's Exhibit 1 for identification is the document that was filed with the Committee of Congress pertaining to the claim of Honolulu Plantation Company, a copy of it?

A. No, I can't say that. I had nothing to do with the filing of it. The document was prepared in California. It was filed there, and the copies were sent to us. Whether there were amendments or changes——

Q. The copies that were sent to you as President of Brewer and Company, the owner of a hundred thousand shares of stock, you looked at it carefully before it was filed in Congress, did you not? [1855]

A. No, sir, we employed competent men to file

(Testimony of P. E. Spalding.)

this document, men in whom we had confidence. They prepared it and we accepted it there.

Q. Were there exhibits attached to Government Exhibit No. 1 by somebody that you hired or by somebody in your office?

A. No, I can't tell you.

The Court: Just a minute. You will have to stop when there is an objection.

Mr. Vitousek: The Court will recall there was about an hour and one-half on the same thing yesterday. Mr. Spalding stated that he didn't know. Mr. Spalding said possibly some of these were prepared in the office. He didn't know but gave possible names. Now we are going to go through all that again. We object to the question. It's already been answered several times.

Mr. Rathbun: It hasn't been asked and answered in the sense that I am going into it now. We have a copy in front of him. The first time we had it. The mystery of this, saying that that wasn't filed, what is the mystery about this? That's what I'd like to know. Why don't they give us what was filed? And if this is not it, then we'll know.

The Court: There certainly has been mystery throughout the case about what was actually filed with Congress.

Mr. Rathbun: Are they ashamed of their claim or what is it? But there shouldn't be any mystery about it in this [1856] Court.

Mr. Vitousek: If the Court please, counsel has a chance to talk about a mystery and being ashamed.

(Testimony of P. E. Spalding.)

If this claim is in Congress, the Government has the right to see it the same as everyone else. They were present at the hearing. I stated to the Court that we don't know what changes were made because it was handled by Mr. Courtney. I wrote for them. I haven't got them yet. But in our theory of this case, this claim is immaterial before this Court. That was a claim before Congress and we intend to, as I stated at the beginning, to object to it. It isn't up to us to prove their claim. They had a means of getting it from the Committee where it was filed, get it certified, and it's been a long time that this case has been set for trial and they could have done so.

Mr. Rathbun: He said we were present at a hearing. I don't know what hearing.

Mr. Vitousek: The Committee that was out here.

Mr. Rathbun: Who was present?

Mr. Vitousek: You.

Mr. Rathbun: How long was I there?

Mr. Vitousek: I don't know.

Mr. Rathbun: Five minutes. If you are going to make a statement like that, I had nothing to do with it and you know it.

Mr. Vitousek: Neither did I. [1857]

The Court: Proceed.

Q. Again I will ask you whether or not this document, Government Exhibit No. 1 for identification, is a copy of the document that was filed with the Congressional Committee of the Congress of

(Testimony of P. E. Spalding.)

the United States in connection with the claim of Honolulu Plantation Company?

Mr. Vitousek: If the Court please, we object. It's already been asked and answered several times and asked and answered this morning.

The Court: Overruled.

A. Well, again I reply that I do not know whether this is the identical document, identical with the document that was filed in Congress.

Q. As President of C. Brewer and Company can you tell me anyone in C. Brewer and Company here among the officers or employees that might be able to tell whether or not this document, Government Exhibit 1 for identification, is a copy of the document that was filed in Congress?

A. I can not.

Q. You haven't the slightest knowledge about that?

A. This document was filed in Congress by Mr. Courtney.

Q. Mr. Courtney is a lawyer, isn't he?

A. He is.

Q. Did Mr. Courtney make up those exhibits attached here from the books of the Honolulu Plantation Company? [1858]

A. I certainly don't think he did.

Q. You know he didn't don't you?

A. I don't know.

Q. They were made by the Honolulu Plantation Company's office here, through C. Brewer and Company, weren't they?

(Testimony of P. E. Spalding.)

A. I do not think so. There were many figures——

Q. Well, who would know about it in C. Brewer and Company here? A. Nobody.

Q. Everybody is off the confines of the Territory of Hawaii that knows anything about that subject, is that right, at the present time?

A. I don't know anyone in C. Brewer and Company that can answer the question that you have asked me.

Q. You don't know anybody in C. Brewer and Company that can tell me whether or not Government Exhibit 1 for identification is a copy of what was filed with the Congress of the United States?

A. That's correct, I do not know.

Q. There will have to be some deep situations here before we get through, I guess. Mr. Harold Kay is the Assistant Secretary of the Honolulu Plantation Company, is he not, and was he not in '44? A. I believe so, yes.

Q. You have no reason for believing that Mr. Harold [1859] Kay, being also an officer of C. Brewer and Company, has any knowledge as to whether or not that document, Government Exhibit 1, was filed with Congress?

A. I believe he has more knowledge of it than I do, but whether he could state to you that that is the copy that was filed in Congress, I don't know. You will have to ask him.

Q. And with all the work that you have done in connection with this claim, and the conferences

(Testimony of P. E. Spalding.)

that you had, you can't tell whether or not Mr. Kay knows what was filed with Congress?

A. Well, now, you are asking me about a hundred pages here with a lot of exhibits and documents, whether they have been——

Mr. Rathbun: I imagine the Court——

The Court: Let him answer.

A. ——I was going to say, whether there were changes that were made from this at the time of filing, some changes in details, I don't know.

Q. Do you want to compare it with something that you have to make sure?

A. No, I certainly don't.

Q. Well, I'm going to ask you to do it. If there is anything in the files of C. Brewer and Company or Honolulu Plantation Company in this Territory that you can compare that with to answer my question, I am willing to give the gentleman [1860] time to do it so he can answer that question, get this mystery removed, if your Honor please, if I can. I will do it if I have to take depositions in Washington. It seems silly to have to.

The Court: Do you want to compare Exhibit 1 for identification?

The Witness: I'd like to send and get a copy of what was filed in Washington and present it.

Mr. Rathbun: This trial, if your Honor please, started weeks ago. That very question came up weeks ago. And if there isn't some good reason for it, they should have had their copy here by this time

(Testimony of P. E. Spalding.)

through their attorney, Mr. Courtney, or whoever it is.

The Court: I understood from Mr. Vitousek a few minutes ago that he'd send for it, that he had sent for it.

Mr. Rathbun: Well, I don't know when he sent or what date or anything about that.

The Court: But the basic question is whether or not the witness wishes to take Exhibit 1 for identification and compare it with anything available so he could answer whether or not it is identical with what was filed with Congress. Do you want to do that?

The Witness: Well, I don't know what I would compare it with. I would have to get the document that was filed in Washington. It must be in the records there. [1861]

Mr. Rathbun: Do you think, Mr. Spalding, if you talked to Mr. Kay right now and asked him whether there is anything over there that compared with it, whether or not it would help?

The Witness: I might.

Mr. Rathbun: Do you want to do it?

The Court: Do you want a recess?

Mr. Vitousek: Yes.

The Court: We will take a recess and let you talk it over.

(A short recess was taken at 10:40 a.m.)

(Testimony of P. E. Spalding.)

After Recess

The Court: How do we stand now?

Mr. Vitousek: That's what I was going to ask, to ask for the record there as to how we stood and how it was left.

The Court: Well, it was left, as I understand it, asking Mr. Spalding if by talking to Mr. Kay he thought he might be able to shed some light on the question before us. As a result of talking to Mr. Kay, Mr. Spalding, can you answer the question regarding this Congressional claim with any rate, any degree of accuracy?

The Witness: Only that—no, I can't, I can't answer it. Maybe some degree, more degree, but no complete comparison.

The Court: You are still not able to say whether or not Exhibit 1 for identification is identically the same as that [1862] which was filed with Congress?

The Witness: No. But if the Court would desire it, I am sure we could send on to Washington to request a copy.

Mr. Rathbun: Now, I am asking now of the Court for an order in this case, in view of the fact that the Court is perfectly familiar with our purpose. It is wholly admissible and goes to the credibility of the witness. I am now asking them to produce a copy from Congress so we can compare it to see whether it is or is not.

Mr. Vitousek: If the Court please, we don't believe that that is a proper subject matter of an

(Testimony of P. E. Spalding.)

order of this Court. We can produce what we have here. But if the claim is before Congress we can't do that any more than the Government can. The Court could order us to produce something that is peculiarly within our knowledge, the same as we have argued that all out on the question of discovery of documents at the beginning of this case. But on something that is easy for them to secure, or for them to secure the same as it is for us, then it's up to them to secure it. It isn't up to us to anticipate what the theory of their defense is, and they are entitled to have the theory, of course, but if it appears to them that this claim is material—and I stated right at the beginning that we contend that it isn't, and we'll point out reasons when it is offered, if it is—they should have secured this certified copy of the claim from Congress and had it here before the Court. [1863] It wasn't up to us to secure it. That there have been changes in it, I found since I was here. I wasn't in that case before Congress. I came before this Court in these cases and stated our position. And if this has been filed before the Committee of Congress, it then becomes a public document, open to the Government for inspection as well as to anyone else. Therefore, it is easily obtainable by the Government as it is by the respondent in this case.

The Court: Well, it is also true, isn't it, that the company should know what they filed with Congress?

Mr. Vitousek: The company should know what

(Testimony of P. E. Spalding.)

it filed with Congress, that's quite true, if the Court please, but Mr. Spalding explained that this company is a California corporation. The claim was prepared there and Mr. Courtney was handling the matter. As to whether there have been changes made in it, that is a matter we will have to find out.

Mr. Rathbun: Now, on the question of materiality, that's a different ground entirely than we are using this document for. What we have gone into here is on cross-examination. Just a minute, now, please. The cross-examination, the credibility of the witness. It's admissible on Mr. Schmutz' testimony. He identified it. It's admissible. It's an admission against interest. We'll show your Honor that it is. It's admissible on several grounds. Now, our duty, as your Honor very well said,—they should know what they filed in [1864] Congress by this time, the President of C. Brewer and Company, as stockholders in the extent of more than one-third of the stock of this company. But we have presented what we thought was filed in Congress. What more can we do? Now we find that there is some kind of mystery about it, that that isn't what was filed. All we are trying to do is find out what was filed. And if it varies from the things that we rely upon on the credibility of witnesses in this case, we will offer it for that purpose in evidence in our case, and then we'll know whether or not what we have asked has any materiality. If it doesn't change it any, why it stands as it did. We have a right to know that.

(Testimony of P. E. Spalding.)

The Court: It has not been clear to me heretofore, until your last question, that the exhibit for identification that you have and have had marked as such in this case was a document which the Government contends is identical with that which was filed in Congress.

Mr. Rathbun: All I know is that it is furnished to me as a lawyer as the one that was filed.

The Court: Through Government sources, of course?

Mr. Rathbun: Yes, your Honor, of course. Further than that, Mr. Vitousek just got through stating we have gone through this and we found that there were changes. Where did he find the changes from if he didn't have the original? How does he know there were changes? He must have seen the document or [1865] he wouldn't know there were changes in it.

The Court: Well, it seems to me the only way this confusion could be cleared up is to get an accurate copy of what was filed with the last Congress in relation to that Congressional claim to which reference has here been made. And since the Government has produced a document which it represents as a copy of the one filed with Congress, I think it is incumbent upon the company, since it was the one that filed it, to produce a copy of what was filed. I will ask you to do that.

Mr. Vitousek: Does the Court want to set the time?

The Court: Well, I don't know whether I can

(Testimony of P. E. Spalding.)

very well do that. I will ask you to do it with dispatch.

Mr. Vitousek: It has been pointed out to me that it may necessitate the whole record back there. Now, they can mumble all they want to, but I was informed by people that changes were made there, by people who know, should know, in the course of the proceedings. Now, I don't know the purpose of offering it other than as counsel stated, and that is, he is offering it, he says, to impeach the witness' testimony. Well, in the first place that will have to be pointed out, where there was any contradiction in it. In the second place, if the Court will examine this document it will find it contains a brief also which is certainly immaterial in impeaching anyone. Counsel is offering that, stating he is going to offer it in [1866] order to get this matter before the Court. And that's what we have no objection to being done, is to get a complete record for Congress, everything that went in, the whole testimony and record. That's what we have no objection to coming before the Court. But to have it piecemeal, when I don't know whether it's accurate—he now states I was not telling the truth. He's very loose with those statements. I have not seen the document, but I was informed on two or three occasions, and the testimony came out on this stand by Mr. Crozier himself that when that was presented to him he said he had seen it, he didn't know anything about it. It was stated by Mr. Schmutz in regard to two or three of the exhibits.

(Testimony of P. E. Spalding.)

So I don't know just where the changes were, or I would have compared them long ago. But I haven't got such a document and have been unable to find it locally.

The Court: As I understand it, the request—and that's what I base my direction upon—was for an accurate copy of what was filed, I presume originally, with the Congress last, past.

Mr. Rathbun: That's right, your Honor.

The Court: Something started the ball rolling.

Mr. Rathbun: Evidence that they produced. I don't ask for that in a hearing before a Congressional Committee or something of that sort. I want this claim. They filed pleadings there like they do in a law suit. A bill is based on it. [1867]

Mr. Vitousek: Let me get the understanding of the Court order, since I wish to except.

The Court: You may have an exception. But in view of the fact, I repeat, that the Government stands here with the representation that from Government sources it has acquired and introduced here as Exhibit 1 for identification a document which it believes to be a copy of the original claim filed with the last Congress by this company, and there is some confusion about it in the minds of officers of the company as to whether it is or isn't what was actually filed, on the theory that the company should know exactly what it did file, I am asking you, as attorneys for the company, to produce an accurate copy of what was originally filed by this company when it made its claim to the last Congress.

(Testimony of P. E. Spalding.)

Mr. Vitousek: And to that order I wish to enter an exception.

The Court: You may have an exception. And you asked me if there was any time limitation on getting it here. I do not think I can have a time limit, I don't think I can very feasibly put a time limitation on it. All I can ask is that you produce it with such dispatch as is possible, which I would suggest be sending for it air mail and having it returned or sent out here by air mail.

Mr. Rathbun: Of course, until that arrives, if your Honor please, when I finish with Mr. Spalding I want a reservation [1868] that I can cross-examine him further when we get it.

The Court: All right.

By Mr. Rathbun:

Q. Now, you stated, Mr. Spalding, that since 1944 there had been a change in business conditions and that the price of sugar had gone up, is that correct? A. That's correct.

Q. The expenses of producing sugar have gone up also? A. That's correct.

Q. In a ratio that exceeds, according to some authorities, the prices that are obtained?

A. That depends upon the circumstances of the particular company. In some companies they have not gone up in that ratio and in some they have exceeded that ratio.

Q. Yours has gone up, hasn't it, at least?

A. This Honolulu Plantation?

Q. Yes. A. Markedly.

(Testimony of P. E. Spalding.)

Q. Yes. Labor, materials and everything else that you use in the production of sugar?

A. The production in volume increases your unit cost.

Q. I'm talking about expenses, costs. They have all gone up?

A. You are talking cost per ton or cost——

Q. The things that you have to buy. Labor, for one thing. [1869]

A. Yes, it has gone up.

Q. Materials that you have to buy?

A. It has gone up.

Q. All the things that have gone into the production of sugar that you have to pay money for have gone up since 1944?

A. That's right. But not necessarily to the direct ratio in the change in sugar price.

Q. You haven't told me about ratio. They have gone up?

A. I thought that was your question.

Q. I notice on Honolulu Plantation Exhibit 13-U, on page 18, at the top under the document on 18 and 19, headed "Permanent Improvements and Property Accounts, December 31, 1944," an item of real estate, fee simple, \$182,214.85. I notice an item under that real estate, leasehold, \$267,864.78. What does that item under leasehold mean? How is it made up?

A. That's the unamortized balance of the leasehold values.

Q. At some time in the course of business you

(Testimony of P. E. Spalding.)

acquired some leases and you put upon your books a value for them, is that what you mean by that?

A. Yes.

Q. And then you amortized it? A. Yes.

Q. Commensurate with the expiration date of the lease, [1870] is that right, so at the time the lease was over it would all be amortized out?

A. That's right.

Q. But you had against it a reserve against depreciation, didn't you?

A. Not for depreciation.

Q. No? Wouldn't you have any reserve?

A. Your present depreciation is different from your amortization.

Q. Would you have any reserve for your amortization? A. Not necessarily.

Q. Well, did you at the Honolulu Plantation Company? A. Not that I know of.

Q. Well, do you know?

A. I'll see if they have it here. No, they have no reserve amortization.

Q. Now, when that item was originally made up, that's just a carrying on from year to year that results in \$267,864 in 1944, isn't it?

A. No, that was the figure at the start of '44. You see, over here. (Indicating.)

Q. I see that over there.

A. At the end of the year.

Q. Yes, that's after you depreciate or amortize for that year? [1871]

A. That's right.

(Testimony of P. E. Spalding.)

Q. Now, the \$267,864 at the beginning of the year '44, that's what was left of the sum after you had amortized for several years before that, wasn't it? A. That's correct.

Q. How did you make up the original sum which resulted in this amortization in '44 of \$267,864?

A. That was done long before I knew anything about the company.

Q. Haven't you ever investigated to find out?

A. No.

Q. Never? A. No.

Q. And you don't know. A. No.

Q. Don't you know, as a matter of fact, that that is established, that original account, by the amount of money that is paid out for clearing land when they lease land, the original planting and all the costs that went into it, prepared for cane land?

A. I don't know how they did it at that time.

Q. You haven't the slightest idea as the President of this Company?

A. Some 40 or 50 years ago the amount of the leasehold value was set up and was amortized. When I came into it, it was a balance remaining. When the leases were extended, the [1872] amortization was extended.

Q. So to understand you correctly, as President of C. Brewer and Company, the agent for the Honolulu Plantation Company, you have seen year after year that item; it was lumped years before on real estate only, wasn't it? A. Yes.

(Testimony of P. E. Spalding.)

Q. You have seen that item and you never saw fit to have that looked into to see what the origin of it was? A. That's correct.

Q. Just what did Honolulu Plantation Company sell in this recent sale for \$3,750,000?

A. Oh, its physical assets, good will.

Q. Well, now, just what do you mean first by physical assets?

A. Lands, leases, growing crops, trucks, tractors.

Q. Did you sell growing crops?

A. Growing crops.

Q. They were included, were they?

A. Yes, everything that was on the property.

Q. Moveables? A. Moveables.

Q. Trucks? A. Trucks.

Q. Vehicles? A. Vehicles. [1873]

Q. Everything?

A. Locomotives, ditches, reservoirs, buildings, all the fee simple land.

Q. Nothing was excepted from it?

A. Nothing was excepted.

Q. How about the cash on hand?

A. Cash on hand was not included.

Q. In 1944 the company had \$1,973,275.81 in current assets, did they not?

A. Let me see it. (Exhibit in evidence handed to witness.) Total assets, \$1,973,275.

Q. Now, the items on which this is made up, as shown by your balance sheet of December 1, 1944, didn't include any of these physical properties that you sold, did it?

(Testimony of P. E. Spalding.)

A. Well, it included these inventories of plantation supplies.

Q. Four hundred sixteen thousand dollars worth approximately, is that it?

A. Yes. No, it included the fertilizer stock, the yeast plant.

Q. All the things under the heading of inventories on page 12?

A. With one exception, which was the inventories of sugar in process, raw sugar, and the mill supplies themselves.

Q. How much would those amount to? [1874]

A. Oh, they might amount to 175, two hundred thousand dollars, depending on how much sugar—

Mr. Vitousek: I didn't hear that.

A. Between 175, two hundred thousand dollars, somewhere in that neighborhood.

Q. Then deducting that from the four hundred sixteen thousand under inventories on page 12, would leave about 216 or two hundred twenty thousand dollars which were physical properties, is that right? A. Yes.

Q. Then take that off, two hundred thousand from the \$1,973,000, approximately, you'd have at least a million eight hundred—you'd have at least a million seven hundred fifty thousand, wouldn't you? A. Yes.

Q. Current assets? A. Yes.

Q. Now, that's quick assets like certificates of deposit, cash, accounts receivable?

A. That's right.

Q. Sales in suspension, and so forth?
(Testimony of P. E. Spalding.)

A. Yes.

Q. And was there any substantial change in that?

A. Well, of course you have all your current liabilities.

Q. I understand all that. I'll get to that in just a [1875] moment. You're anticipating me.

A. I'm sorry.

Q. Now, on the other side, on page 13, you had at the close of business of December 31, 1944, \$775,000 of current liabilities, didn't you?

A. Yes.

Q. That's a pretty good current position, wasn't it?
A. Yes, a very good current position.

Q. So that you had approximately a million dollars over your liabilities in current assets at the close of business in 1944, didn't you?

A. Right.

Q. You didn't sell those, did you?
A. No.

Q. Such assets as that, is that right?

A. Yes, that's right.

Q. I show you on page 15 of Honolulu Plantation Exhibit 13-U an item under condensed statement of profit and loss for the year ended December 31, 1944, an item under the heading "Other Expenses: Expenses re Claim in Connection with Condemnation of Land and Properties, \$33,041.55." What made up that item?

A. Well, I'll have to go back to the books to find out what made it up. I can say what I think.

Q. Tell me what you think first. [1876]

(Testimony of P. E. Spalding.)

A. I think it's the expenses in connection with preparing the claim to Congress and also expenses in connection with some condemnation adjustments and payments for the growing crops which the Government awarded.

Q. You have another item showing that, don't you? Well, is any of that for witnesses' fees?

A. Not that I know of.

Q. Where would you put the expense of a witness fee in connection with your claim for Congress if you didn't have it there?

A. If there were any witnesses at that time in the year '44 it would undoubtedly go in there as an expense.

Q. Well, it might be in there, is that it?

A. I don't think we were before Congress in '44.

Q. When did you hear Mr. Schmutz who testified in this case?

A. It must have been in '44 some time.

Q. Before the expiration of this year, wasn't it?

A. Yes.

Q. That might be in there, might it not?

A. It might be.

Q. Can you find out about that?

A. You mean as to the details of that statement?

Q. Yes, especially what I asked you about, witnesses in connection with your claim. [1877]

A. If that's important.

Q. That's important to me.

(Testimony of P. E. Spalding.)

The Witness: May I ask a question, your Honor? Witness fees, that means fees paid to witnesses appearing before the Court?

The Court: I presume Mr. Rathbun includes Congressional claims.

Mr. Rathbun: Congressional claim. He didn't appear in Court in 1944, yet, as far as I know.

The Court: Wait a minute. I think there is confusion here between the two of you. The witness asked me about witness' fees, does that include fees paid witnesses for appearing in court, and I said or I think Mr. Rathbun means in connection with the Congressional claim.

Mr. Rathbun: I mean that. But if there were any fees paid in connection with this law suit, preparation or otherwise, that's what I'd like to know also.

The Court: Well, I think the point of confusion is that there may have been someone hired in relation to the Congressional claim but hadn't actually testified.

Mr. Rathbun: I don't want it limited to testifying.

Mr. Vitousek: If the Court please, there is still a lot of confusion there. I think the best thing is to ask for a breakdown, because the witness preparing himself to testify might be entirely different from someone preparing a claim or [1878] assisting in the preparation.

Mr. Rathbun: I am perfectly willing to have a breakdown.

(Testimony of P. E. Spalding.)

The Court: The best thing to do is to bring in a breakdown of that item, for the year 1944.

By Mr. Rathbun:

Q. Mr. Spalding, in this sale again that recently took place for \$3,750,000, did you sell this claim that you now are contesting in this courtroom? A. No, sir.

Q. What? A. No.

Q. You retained that?

Mr. Vitousek: May I have that question?

(The reporter read the question referred to.)

By Mr. Rathbun:

Q. Do you have a copy of the contract for sale under which this was put through, Mr. Spalding?

A. The contract for sale is a very—is simply an exchange, a simple exchange of letters.

Q. Simple exchange of letters? No details involved? A. No details involved.

Q. Didn't show what they bought, any items?

A. No, just simply bought everything that was there.

Q. Just sight unseen, is that it?

A. They spent months going over the property.

Q. But they didn't specify what they were buying?

A. No, except these physical properties and everything that was on them.

Q. What?

A. The physical properties and everything that was on them.

Q. The physical properties and everything that

(Testimony of P. E. Spalding.)

was on them? That's the only specification of detail that was made on what they purchased by any written document?

A. I can get a copy of the letter.

Q. Does that specify those things what you sold?

A. Well, there's some details about prepaid insurance and prepaid rents and adjustment of that sort to be made.

Q. And that's all? A. That's all.

Q. Would you produce them for inspection?

A. Surely.

Q. I mean by that, I mean anything that pertains to a contract by which you sold this property for \$3,750,000.

A. I'll bring in the letter of the offer and the letter in reply accepting.

Q. And the consummation of it.

A. That's all that exists.

Q. Now, previous to 1944 had this company ever carried on its books—meaning the Honolulu Plantation Company—this item [1880] appearing on page 13 of Honolulu Plantation Exhibit 13-U, at the bottom of the page under the heading "Notes," item 3 thereunder?

A. That's—no, that had never appeared on these.

Q. You never had an item on your books covering that claim, had you? A. No.

Q. You didn't have it on in '44 either, did you?

(Testimony of P. E. Spalding.)

Simply calling their attention to it, that's all, in their report? A. That's all you could do.

Q. Is it?

A. You couldn't set it up in your books.

Q. I disagree with you seriously. If you put value on it.

Mr. Rathbun: Subject to what I have stated, that's all the cross-examination at this time.

The Court: In other words, you wish to recall Mr. Spalding for further cross-examination when an accurate copy of the claim filed with the last Congress is presented?

Mr. Rathbun: And when he presents this breakdown.

The Court: And a breakdown of that inventory figure, or rather profit and loss figure for the year 1944, as presented.

Mr. Rathbun: I mean I'll have to cross-examine him. I don't know, but I want to leave it open in case I do. [1881]

The Court: No doubt he can come in promptly with a breakdown of that \$33,000 item.

Mr. Rathbun: I should think so.

The Court: Do you want him to come back with that now or do you want to wait?

Mr. Rathbun: We might as well clean up all we can now, if it's available.

The Witness: I'll have to send to the plantation for that breakdown where the books are kept.

The Court: Would it be available tomorrow?

(Testimony of P. E. Spalding.)

The Witness: I can probably have it by tomorrow.

The Court: Those are the only two items?

The Witness: And these two letters.

The Court: Oh, yes, the two letters.

Mr. Vitousek: I just want to get it clear. There were two letters, the offer and acceptance, the breakdown, and what is the other?

The Court: The Congressional claim.

Mr. Vitousek: Oh, yes.

The Court: All right, subject to those reservations, the cross-examination is concluded. You may examine him on redirect if you wish, or do you wish to wait?

Mr. Vitousek: I would rather wait, not for the claim but for those other matters on that sale, if the Court please, before we have redirect, so we can clean that up. The claim, [1882] I don't know, I'll try to get it as soon as possible. I mean the sale I want cleaned up.

The Court: I know what you are talking about.

The Witness: I think I'll be able to have these two items by tomorrow morning.

The Court: All right, you are excused at this time until tomorrow morning. And do you have any other witnesses? Mr. Austin is supposed to be recalled.

Mr. Vitousek: Mr. Austin was called out off the island, and I was going to call him further. Unless something develops in the cross-examination of Mr. Spalding on redirect, we were going to close with

Mr. Spalding. And to date I don't think anything happened but I wouldn't want to say I wouldn't call someone.

The Court: Do you have any further witnesses to use this morning? In other words, we might just as well adjourn now until nine o'clock tomorrow morning when Mr. Spalding will have two of the three things brought out on cross-examination.

Mr. Vitousek: Yes.

The Court: All right, then, nine o'clock tomorrow morning.

The Court adjourned at 11:25 o'clock, a.m.)

Honolulu, T. H., January 10, 1947

The Clerk: Civil No. 514, United States of America versus 257.654 acres of land, and Civil Nos. 521, 525, 527, 529, 532, 533, 535, 536, 540, 544, 548 and 684, for further trial.

The Court: Are the parties ready?

Mr. Vietusek: Yes.

PHILIP EDMUND SPALDING

a witness in behalf of the Defendants, having previously been sworn, resumed and testified further as follows:

Cross-Examination
(Continued)

The Court: Mr. Spalding, you are mindful that you are still under oath?

The Witness: Yes, sir.

The Court: I believe you were asked to come

(Testimony of P. E. Spalding.)

for two matters, one, to break down a certain figure, and bring documents pertaining to the recent sale of the Plantation Company.

The Witness: I have them here.

The Court: Mr. Rathbun, he has brought the documents that you asked for.

Mr. Rathbun: Well, I'm looking at another one that they have handed me.

Mr. Vitousek: I have handed copies to them.

The Court: Will you sit there for just a moment until Mr. Rathbun is ready to ask you additional questions on cross-examination.

Mr. Rathbun: Now, what else do you have there? Is it the same things that I have?

The Witness: The same thing as you have, that's the same as I have, the same as you have.

Mr. Rathbun: Well, we have looked at these two now.

The Court: Any further questions?

Mr. Rathbun: What about the claim? They were to prepare that over night.

The Court: No, that was not my understanding. I told them to have a copy, to get an accurate copy—

Mr. Vitousek: What I am trying to do, which is most difficult being here in Court, is to get by telephone the attorney who handled this matter, to have him get the copy, if there are differences. That's Mr. Courtney in Washington.

The Court: You have?

Mr. Vitousek: I had a call but it has not come

(Testimony of P. E. Spalding.)

through because I have court in the morning and there's about four or five hours difference; it's a little difficult to get an appointment call. As soon as I do, he will either be asked to send one out or we will know what the differences are, if any. I'm as anxious to expedite this as anyone, if the Court please.

The Court: Well, that's the third point that has been [1885] reserved before we adjourned yesterday. When we adjourned yesterday, it was clear that there were only two of the three points that we could possibly clear up today.

Mr. Rathbun: These papers pertaining to the sale, do you want them to go in evidence, Mr. Vitousek?

Mr. Vitousek: Well, you called for them.

Mr. Rathbun: I can't offer the evidence in my case.

Mr. Vitousek: I have no objection. We'll raise no objection.

Mr. Rathbun: Mark them for identification. I have been furnished by Mr. Vitousek, pertaining to the sale of these properties, a letter dated November 29, 1946, addressed to Honolulu Plantation Company, care of C. Brewer and Company. Honolulu, by Oahu Sugar Company, Limited, which I ask to be marked.

Mr. Vitousek: Those are for your use. Those are copies of these, if you want to use them, so you can keep those.

Mr. Rathbun: I ask that it be marked for iden-

(Testimony of P. E. Spalding.)

tification as Government's Exhibit, whatever the next one is.

The Court: It may be so marked.

The Clerk: U. S. Exhibit 12 for identification.

(The letter referred to was marked "U. S. Exhibit No. 12 for identification.")

Mr. Rathbun: Also furnished to me is a letter dated December 3, 1946, directed to Honolulu Plantation Company, [1886] care of C. Brewer and Company, from Oahu Sugar Company, and I ask that that be marked for identification.

The Court: It may be so marked.

The Clerk: U. S. Exhibit No. 13 for identification.

(The letter referred to was marked "U. S. Exhibit No. 13 for identification.")

Mr. Rathbun: Also there has been handed to me a letter dated December 6, 1946, directed to Honolulu Plantation Company, care of C. Brewer and Company, from Oahu Sugar Company. I ask that that be marked for identification.

The Court: So ordered.

The Clerk: U. S. Exhibit 14 for identification.

(The letter referred to was marked "U. S. Exhibit 14 for identification.")

Mr. Rathbun: What's the date of that last letter?

The Clerk: December 6, 1946.

Mr. Rathbun: I also offer—there has been furnished to me also a letter dated January 1, 1947, directed to Oahu Sugar Company. care of Ameri-

(Testimony of P. E. Spalding.)

can Factors, Limited, Honolulu, from Honolulu Plantation Company, which I ask to be marked for identification.

The Court: So ordered.

The Clerk: U. S. Exhibit 15 for identification.

(The letter referred to was marked "U. S.

Exhibit No. 15 for identification.") [1887]

Mr. Rathbun: I'll have to take time to read this. This isn't in the copy furnished me. This is a resolution. There has also been furnished a copy of a resolution passed by the Board of Directors, with no date, pertaining to this sale, which I ask be marked for identification.

The Court: Resolution by what company?

Mr. Driver: Honolulu Plantation.

Mr. Rathbun: Honolulu Plantation Company. There is no date of the passing of the resolution.

The Witness: I might say something. The letter of acceptance of January 1st enclosed copies of the original letters and the resolution adopted by the directors, which was approved by the shareholders. It's all referred to in that letter.

Mr. Driver: But the resolution itself is undated.

The Witness: It's referred to in the body of the letter. All these were attached to the letter of acceptance to complete the record.

Mr. Rathbun: Meeting date, December 23, '46.

Mr. Vitousek: Has that been marked yet?

The Court: It hasn't been marked yet but I am wondering if it should be something, as part of something marked.

(Testimony of P. E. Spalding.)

Mr. Rathbun: It goes with the letter of January 1st.

The Court: It should be included with U. S. Exhibit 15 for identification. [1888]

By Mr. Rathbun:

Q. Mr. Spalding, in the letter of January 1, 1947, it provides for instruments of conveyance to be prepared, including bills of sale, does it not?

A. Yes, yes.

Q. Those have not been prepared yet, I take it?

A. No.

Q. Completed? A. No.

Q. Also an inventory. That has been completed yet? A. No.

Q. The detail, then, of certain things that are conveyed, does not appear by these letters as yet, does it?

A. No, the detail that the—the letter covers it, but the detail—

Q. The bill of sale will cover, I assume, the exact assets that they are taking over, will it not, so far as things that are concerned that are visible or tangible?

A. Well, it will depend how the lawyers want the bill of sale drawn. It will cover everything that is included in here. How much detail they want will be furnished.

Q. This document, marked for identification as Government's Exhibit 3, being the tentative draft of the agreement that was enclosed, lease rather, that was never signed or executed, was it? [1889]

(Testimony of P. E. Spalding.)

A. No.

Q. By anyone? A. No.

Q. Either by the trustees of the Damon Estate or Honolulu Plantation Company? A. No.

Mr. Rathbun: That's all we have.

The Court: What's that?

Mr. Rathbun: That's all. I want to make some substitution, however.

The Court: You are still reserving one point on the Congressional claim?

Mr. Rathbun: Yes, your Honor. When we have that claim straightened out—

The Court: There's one other, a breakdown that you asked for.

Mr. Rathbun: I know. I have seen that and I haven't any questions on that.

The Court: Very well.

Mr. Rathbun: I want at this time now to substitute for Government's Exhibit No. 2 for identification a copy instead of the original. This doesn't belong to us. I had that agreement yesterday.

The Court: Yes.

Mr. Rathbun: Independent of any notations that are on [1890] it in handwriting.

Mr. Vitousek: You have checked it?

Mr. Rathbun: I have, yes. Same thing.

The Court: Very well, a copy may be substituted for the original of U. S. Exhibit 2 for identification.

Mr. Rathbun: And may this copy be marked 2

(Testimony of P. E. Spalding.)

for identification and just physically withdraw this?

The Court: Yes.

Mr. Rathbun: Also attached to Government Exhibit No. 2 for identification is a lease, a proposed lease, which has been marked Government Exhibit 3 for identification. I now ask leave to withdraw the original of that document, namely, the proposed lease, and substitute therefor a copy and ask that that be marked Government Exhibit 3 for identification instead of the original.

The Court: Very well.

Mr. Rathbun: As to Government Exhibit 6 for identification, I also ask leave to withdraw that copy which has been marked, because that's their original copy with their own notations on it, in the Damon Estate, and ask leave to substitute for that a copy, being the letter dated August 15, 1941, and ask that the copy be marked Government Exhibit No. 6 for identification, and that I be allowed to withdraw the copy which has already been marked.

The Court: Very well. [1891]

Mr. Rathbun: I think that's all we have with Mr. Spalding.

The Court: Very well.

Mr. Vitousek: I ask for redirect, please.

The Court: You may proceed.

Redirect Examination

By Mr. Vitousek:

Q. May I see that breakdown? (Witness hands a sheet of paper to Mr. Vitousek) This sheet is

(Testimony of P. E. Spalding.)

headed "Breakdown Explanation of Item Entitled Expenses Re Appeal to Congress \$33,041.55." Was that prepared at counsel's request yesterday?

A. That was prepared, yes.

Q. And that item appears in the annual report for what year? A. 1944.

Mr. Vitousek: If the Court please, we offer this in evidence.

The Court: Hearing no objection, it may be received as Plaintiff's exhibit—

The Clerk: Honolulu Plantation Exhibit No. 17.

The Court: Seventeen?

The Clerk: Seventeen, your Honor.

(The document referred to was received in evidence as Honolulu Plantation Company's Exhibit No. 17.)

Q. Mr. Spalding, you were asked yesterday about Matson Securities Company holdings. Do you know the ownership of the [1892] Matson Securities Company??

A. I can't say definitely that I know, but I believe it to be the ownership—the ownership is Mrs. William B. Roth, who is a former—a daughter of Captain Matson who organized the Matson Navigation Company.

Mr. Vitousek: If the Court please, in reference to U. S. Exhibit 6 for identification, being a letter from the trustees of the Damon Estate to C. Brewer and Company, dated August 15, 1941, which was produced yesterday by counsel for the United

(Testimony of P. E. Spalding.)

States from files, I will ask that the reply be produced so we can offer it for identification, by the Government, reply to the trustees, to this letter by Honolulu Plantation.

Mr. Rathbun: The letter is from Damon to Brewer, isn't it?

Mr. Vitousek: This was from Damon to Brewer. I am asking that you give the reply, produce the original reply from Brewer to Damon, reply to this letter.

Mr. Rathbun: Why don't you get it from Brewer?

Mr. Vitousek: The original would be in the hands of the Damon Estate, and I have been informed that you have them in your files.

Mr. Rathbun: You can get it from the Damon Estate as well as I can.

Mr. Vitousek: You had the files here yesterday.

Mr. Rathbun: What files did I have here yesterday? [1893]

Mr. Vitousek: The Damon Estate said they loaned you the files. I just asked you if you have it.

Mr. Rathbun: I can go into the office to see if I have it in the files.

The Court: All right, we'll wait until you get your file.

(Mr. Rathbun leaves courtroom, returning in a few minutes with a document.)

By Mr. Vitousek:

Q. Mr. Spalding, I will show you a letter, original letter handed to me by counsel for the Gov-

(Testimony of P. E. Spalding.)

ernment, dated August 21, 1941, addressed to Trustees under the Will of Samuel Mills Damon, deceased, and purported to be signed by P. E. Spalding. Is that your signature? (Showing exhibit to witness) A. That's my signature.

Q. Was that letter sent to the trustees?

A. It was.

Q. Now, in the answer, what communication does it answer?

A. Their letter of August 15, 1941.

Q. I'll show you U. S. Exhibit 6 for identification. Is that the letter that was being answered by your communication of August 21, 1941?

A. That is the letter.

Mr. Vitousek: If the Court please, I have a photostatic copy of the carbon of this letter. I'd like to offer it so I [1894] can hand the original back to counsel, if there is no objection.

The Court: Very well. The letter dated August 21, 1941, may be marked—

The Clerk: Honolulu Plantation Company Exhibit No. 18.

(The document referred to was received in evidence as Honolulu Plantation Company's Exhibit No. 18.)

[Printer's Note: Exhibit No. 18 is set out in full at page 1541, of this printed Record.]

Q. Yesterday, Mr. Spalding, in response to questions on cross-examination you gave the duties of Mr. Merriam as head of the land department of Brewer and Company? A. Yes

(Testimony of P. E. Spalding.)

Q. Mr. Spalding, in connection with the Honolulu Plantation Company, who had authority to execute documents? A. I did.

Mr. Rathbun: Just a moment. I object to that as immaterial who had authority to execute documents. Mr. Merriam is the only man involved in this. The record speaks for itself on that. He originated these very negotiations.

Mr. Vitousek: Who did?

Mr. Rathbun: Mr. Merriam, by documents.

Mr. Vitousek: Well, now, if the Court please, that is not the fact shown by the evidence. The testimony of Mr. Spalding was that he handled the negotiations. The matter in evidence here, two letters from Mr. Merriam entered into it after the date of the letters upon which we rely, discounting the lease. May I see the Damon Estate lease?

The Clerk: The lease?

Mr. Vitousek: Yes. If the Court please, the exhibit 9-K, Honolulu Plantation Company, is a lease from the Damon Estate to Honolulu Plantation Company, and two letters attached to it, being a letter to Brewer and Company, agent for Honolulu Plantation Company, to Trustees of the Damon Estate, which is dated October 18, 1940, and a reply from P. E. Spalding, Vice-President of C. Brewer and Company, agent, Honolulu Plantation Company, October 21, 1940. Now, according to my notes the letters of Mr. Merriam were dated respectively November 11, '43, and September 16, '43.

(Testimony of P. E. Spalding.)

The Court: Let me see them, please.

Mr. Vitousek: Which ones?

The Court: The letters that you have reference to, exhibits what?

Mr. Vitousek: Eight and nine.

The Court: You are not concerned with Exhibit 2 for identification, which is the letter accompanying that draft lease which is Exhibit 3?

Mr. Vitousek: Well, this one is following.

Mr. Rathbun: Letter of November 29, 1940, signed by Mr. Merriam.

Mr. Vitousek: Yes, but that still follows.

Mr. Rathbun: Originated this transaction.

The Court: What have you? [1896]

Mr. Vitousek: This originated—I'm having the Court look at the dates. It was a month after the transaction was completed.

Mr. Rathbun: That's what you think.

Mr. Vitousek: Well, I'll argue to the Court later.

Mr. Rathbun: My objection is that that is a point for the Court to consider and determine whether or not he had authority from all of these facts in evidence, including the letters.

Mr. Vitousek: The Court can determine it when the facts are in evidence, but so far Mr. Spalding stated that his duties, his duties as recited by Mr. Spalding, gave Mr. Merriam no authority to vary the terms of the lease. The evidence shows that Mr. Spalding, Mr. Kay and Mr. Austin, and prior to that, I believe, Mr. Larson, were the only ones

(Testimony of P. E. Spalding.)

who had the power of attorney from the company, Honolulu Plantation Company, which is a California corporation. Now, the only other possible use these letters could be for would be an admission against interest of the party who had authority to do so, that is, the writers of the letters, and we have a right to bring that out on redirect, the letters having been presented. They haven't been offered in evidence. And it makes it a little difficult to examine on letters not in evidence. But I think we have a right, since he has asked that question, to clear the matter up. [1897]

Mr. Rathbun: You may assume that they are going to be offered in evidence.

The Court: Well, I am inclined to think that ultimately it is a question for the Court to determine whether or not these letters were within the scope of this man's authority. The witness may tell us what his authority was and what, if he knows, Mr. Merriam's authority was. But for him to state definitely as a conclusion that certain things were not within his and Merriam's authority seems to me to be coming pretty close to what the Court is going to decide.

Mr. Vitousek: That isn't what I asked.

The Court: I think your question was, who was the only one?

Mr. Vitousek: Who were the ones. Did I say only one?

The Court: Well, maybe you said the one. Let's have the question.

(Testimony of P. E. Spalding.)

(The reporter read the last question)

Mr. Rathbun: That's a question for the Court to determine in this case.

The Court: We already have in evidence here the powers of attorney running to the witness. They speak for themselves.

Mr. Rathbun: And he said on cross-examination what the duties of Mr. Merriam were. He has already testified that on cross.

The Court: He told us he was the manager of the land [1898] department, had charge of the documents and general oversight of the land.

Mr. Vitousek: That's quite true. That in general is what he stated.

The Court: In general?

Mr. Vitousek: Yes.

The Court: I think the objection is all right. The objection will be sustained and that answer may go out. You may have an exception.

Mr. Vitousek: If the Court please, we note an exception, and I want to make an offer of proof. I offer to prove by this witness that the only party who had any authority in the Territory of Hawaii, who had any authority to execute documents in behalf of the Honolulu Plantation Company, execute leases or release lands from leases, the only parties were those named in the powers of attorney on file as exhibits in this case; that Mr. Merriam had no authority whatsoever to execute any documents of a nature that would vary a lease already in existence, or to execute a lease or to execute

(Testimony of P. E. Spalding.)

a surrender of a lease, partial or whole. And also that that's a matter within the knowledge of the trustees of the Damon Estate.

Mr. Rathbun: We object to the offer, if your Honor please, for the same reasons in the objection and for the further reason that the question would simply be an attempt to vary what is in evidence, which is for the Court to determine on the [1899] fact of the papers.

The Court: Well, we have clearly in evidence the power of attorney in fact running to the witness now on the stand, and one or two others, I think.

Mr. Vitousek: Yes. If the Court please, may I present my view of this?

The Court: Yes.

Mr. Vitousek: On this offer?

The Court: Yes.

Mr. Vitousek: It's been shown without any question that this is a California corporation.

The Court: That's right.

Mr. Vitousek: Therefore, the company acts only through its officers there or through authority delegated in writing.

The Court: That's right.

Mr. Vitousek: That is, under the statute of frauds it would have to be so. The only authority delegated in writing, so far as this Court is concerned—the only authorities are two powers of attorney, one running from the plantation to Mr. Spalding, Mr. Larson, Mr. Jamieson and H. T.

(Testimony of P. E. Spalding.)

Kay, which expired, which, rather, terminated; and the other one, a later one, running to P. E. Spalding, S. L. Austin and H. T. Kay. These documents, as I read them, give no power of substitution. Now, in order to show—

The Court: Excuse me. They do give power to employ agents, [1900] do they not?

Mr. Rathbun: They'll have to give the power anyway to agents to carry out—

The Court: One at a time.

Mr. Rathbun: They wouldn't have specific authority for that. They are presumed to have authority to appoint such agent to carry out the terms of the attorney-in-fact instrument.

The Court: Usually these powers of attorney have that specifically in there, and I presume this one does. Well, anyway it looks to me as if Merriam was an agent of the attorneys-in-fact.

Mr. Vitousek: If that is so, if the Court please, there being no written delegation of authority—that is the point I was making—then the attorneys-in-fact can explain what authority was delegated to him.

The Court: That is an entirely different matter.

Mr. Vitousek: And that's what is in this offer. In other words, did they delegate to him any authority?

The Court: I'll allow the witness to describe what Merriam's position was and what his duties and responsibilities were, which is an entirely dif-

(Testimony of P. E. Spalding.)

ferent thing, I think, than the question you did ask.

Mr. Vitousek: Well, that's what I was getting at.

The Court: All right. [1901]

Q. Now, Mr. Spalding—I don't find that authority in here, if the Court please—who was Mr. Merriam employed by?

A. He was employed by C. Brewer and Company, with the title of Manager of the Land Department.

Q. Now, just what were his duties?

Mr. Rathbun: I object to that for the reason stated in the objection to the original question, and plus the fact that he has already been over that on cross and given the full statement of his duties. I asked him that specific question.

Mr. Vitousek: If the Court please, this is redirect. That matter was brought out on cross.

The Court: It is substantially the same question that was asked on cross, however. Since it is a new matter on redirect, I will allow the question. You may have an exception. Do you have the question in mind?

The Witness: It is the duties.

A. His duties as Manager of the Land Department, was to take care of all the documents in connection with all land matters and the carrying out of all obligations as a result of leases, or any duties imposed upon the plantation by virtue of the leases. He would prepare tentative drafts of leases,

(Testimony of P. E. Spalding.)

and he would negotiate perhaps with the attorneys of the lessors as to some of the details and the wording of in some of these leases. His negotiations, however, would be entirely controlled by the instructions from principals. He would have [1902] no discretion in that.

Q. Any other duties?

A. Yes, he undertook to oversee the preparation of maps of various plantation properties. We also had in his charge the lands in Maunawili which were owned by C. Brewer and Company, where he acted in general charge of that property.

The Court: Where is that?

A. It has since been sold.

The Court: Where is it—on this island?

A. On the other side of this island.

The Court: No connection with this plantation?

A. No connection with this plantation at all. This testimony should be just in connection with the duties of this plantation?

Q. His duties. I want to get all that you can remember.

A. I think that about covers it.

Q. Well, did he have as part of his duties the executing of any instruments?

A. No. No, he had no authority to execute instruments.

Q. Yesterday, Mr. Spalding, you were shown what has been marked U. S. Exhibit 10 for identification, original signed by yourself to Admiral Ghormley. I will hand it to you.

The Court: Exhibit 11 for identification.

(Testimony of P. E. Spalding.)

Q. I also show you reply addressed to C. Brewer and Company, Limited, or copy of reply from Admiral Ghormley, which [1903] has been marked Exhibit 11 for identification. In the letter from Admiral Ghormley to Brewer and Company, being Exhibit 11 for identification, a reference is made as to the letter: "Receipt of your letter 5701-HTK, no date, is hereby acknowledged." Can you explain that fact, that says no date. And this letter is from Admiral Ghormley and is dated January 12, 1944; Exhibit 10, and it's dated January 3, 1943.

A. Yes, I can explain that. The situation at Honolulu Plantation was becoming very serious with these continued takings of land, and the letter was prepared—

Q. Which letter, now? A. This letter.

Q. That's Exhibit 10 for identification?

A. Exhibit 10. And called on, made an appointment with Admiral Ghormley and called on him some time early December.

Q. What year?

A. Forty-three. With the letter without any date because it was a letter of considerable importance to the plantation and I wanted to discuss it with him and see if the Navy would have any objection to such a letter or in general to discuss the whole problem. He indicated no objection and apparently that undated letter was left with him. Before mailing him a letter officially. Although I also consulted with the directors in San Francisco.

(Testimony of P. E. Spalding.)

And they agreed that such a letter should be sent. It was dated January 3, 1943, the '43 is undoubtedly [1904] an error.

Q. What should it be?

A. It should be 1944. The letter was in Admiral Ghormley's hands several weeks, a month before that.

Q. So the date on this letter, January 3, 1943—

A. A typographical error.

Q. It should be 1944? A. Should be 1944.

Mr. Vitousek: If the Court please, would it be possible—it wouldn't take much longer and Mr. Spalding has a date—not to have a recess? I'd like to go on.

Mr. Rathbun: What's that?

The Court: Any objection to passing the ten o'clock recess?

Mr. Rathbun: No, none at all.

By Mr. Vitousek:

Q. Now, in connection with that letter, Mr. Spalding, to Admiral Ghormley, you stated yesterday, as I recall it, that the Government had in possession a number of these parcels before suit was filed? A. That's correct.

Q. Well, had they taken possession of any of them, and if so, approximately how much, before you sent that letter to Admiral Ghormley?

A. Well, now, they entered on some of these lands in [1905] November and December of '43. Just the exact acreage I do not remember. They

(Testimony of P. E. Spalding.)

entered under a right of entry, I think. And it was these takings that started in November of '43 which gave us this great concern with the ultimate result would be. At that meeting I spoke of, Admiral Ghormley stated he thought that was probably the last of the takings, but his officers who were present corrected that impression; there were to be further takings. That was the reason for proceeding with the letter, because with the further takings the situation was even more serious than we realized.

Q. Now, Mr. Spalding, I show you Honolulu Plantation Company's Exhibit 13-U. Yesterday on direct examination you were asked concerning the amount of current assets as shown on page 12, in fact, that some of them were and some of them were not included in the sale, is that correct?

A. That's correct.

Q. Do you know the amount of those assets that were included in the sale?

A. Of these current assets?

Q. Current assets I'm referring to only. That's shown on page 12 of Exhibit 13-U.

A. Well, the cash, U. S. bonds and certificates, and the accounts receivable, and the sales in suspense were excluded from the sale, and certain of the inventory items were excluded from the sale. Let me put it this way: certain of [1906] the inventory items were to be paid for separately, that is, the plantation supplies, raw sugar, molasses on hand, were to be paid for separately.

(Testimony of P. E. Spalding.)

Q. Well, of the total amount shown there, what was the amount included in the sale, in the total of one million nine hundred some odd shown on this page, and the amount to be paid for separately?

A. Well, against this million nine, there are—

Q. No, I'm just talking about the sale at this time.

A. About two hundred thousand dollars was to be paid for separately.

Q. Paid for separately? A. Yes.

Q. Well, how much was included, the value of the amount included?

A. About the same amount.

Q. About the same amount?

A. About the same amount.

Q. So of these assets, about two hundred thousand should be deducted from the one million nine?

A. That's right.

Q. Roughly. Now, on the opposite page, page 13, is shown the liabilities? A. Yes.

Q. That's correct? What was the amount of the liabilities? [1907]

A. Seven hundred seventy-five thousand.

Q. Well, after the sale, were there any liabilities in addition to those shown?

A. Well, we had liabilities with regard to the retirement pay and separation pay and the pensioners of the plantation.

Q. Well, could you give the amount, the approximate amount of that liability?

(Testimony of P. E. Spalding.)

A. Well, the shareholders appropriated \$400,000 out of the proceeds of the sale for that to meet that purpose.

Q. Now, Mr. Spalding, referring you to the various letters, starting with the one to Honolulu Plantation Company of November 29, 1946, U. S. Exhibit 12 for identification, letters, U. S. Exhibit 13, U. S. Exhibit 14 and 15, would you state with the documents whereby this sale was made?

A. Yes.

Q. Now, did that sale include growing crops?

A. It did.

Q. And what, in your opinion, is the value of the growing crops?

A. The value, in my opinion, the value of the growing crops was approximately a million dollars.

Q. Did that sale include moveable personal property?

A. It did.

Q. In addition to the amount you said, referred to in the current assets? [1908]

A. Yes.

Q. Just give a general description.

A. The locomotives, the trucks, the tractors, the cane loaders, the tools and implements, the laboratory supplies and equipment, office furniture, all the moveables of the plantation.

Q. What, in your opinion, was the value of the moveables you have described?

A. Three hundred thousand dollars.

Mr. Rathbun: There is no question about that, it's immaterial.

Mr. Vitousek: It is material. This sale was

(Testimony of P. E. Spalding.)

brought in by the Government yesterday, the amount of the sale. We didn't bring in the amount. But the matter has been brought in by the Government. The Government also queried about these current assets. Now, the evidence in this case in regard to value excluded moveables and growing crops. So we are entitled to have that amount in view of the fact that the Government brought in the sale, and later on in the argument in this case we can reduce it to a comparable basis. That is part of what was brought in yesterday. We are entitled to bring in the rest of it.

Mr. Rathbun: Mr. Crozier testified that in his value he included moveables.

Mr. Vitousek: I'm sorry, there's a difference of opinion [1909] on that.

Mr. Rathbun: There isn't any difference of opinion in our camp about it.

The Court: The witness may answer the question. You may have an exception.

The Witness: May I have that question?

(The reporter read the last question and answer)

A. My answer would be the same.

Mr. Vitousek: If the Court please, that's all the redirect, reserving the right in case he is examined on Exhibit 1 for identification for further redirect.

The Court: Any recross?

Mr. Rathbun: Yes, your Honor.

(Testimony of P. E. Spalding.)

Recross Examination

By Mr. Rathbun:

Q. Calling your attention, Mr. Spalding, to Government's Exhibit No. 2 for identification, did you have knowledge of the sending of that letter on or about the date that it bears, November 29, 1940? A. Yes, I think I have knowledge.

Q. You knew that Mr. Merriam sent it and dictated it, did you?

A. I requested him to prepare a tentative form of lease.

Q. And you left it to him to prepare that letter, did you? [1910] A. That letter, yes.

Q. Was it necessary under the duties that you say were assigned to Mr. Merriam to submit every letter pertaining to leases, real estate matters of C. Brewer and Company, to you before sending them?

A. If they were concerned with the preparation of a lease or the execution of a lease or the detail of a lease or purchase, anything that required my signature, I saw.

Q. How would he know what required your signature?

A. He's been with the company for a great many years. He was thoroughly conversant with his authorities and what authority he lacks.

Q. Still you never saw these two letters that he wrote, September and November of 1943, marked Government Exhibits 8 and 9 for identification?

(Testimony of P. E. Spalding.)

A. Those I never saw.

Q. Then he didn't always show you the letters that he wrote in connection with lands and matters pertaining to lands?

A. Mr. Merriam failed very materially towards the end of his employment.

Q. Oh, he failed? A. Very materially.

Q. You still kept him on the job?

A. We tried to.

Q. You considered he was competent to carry on his [1911] duties, didn't you?

A. I'm very much concerned about him.

Q. Will you answer my question, please?

A. Well, the answer to that would have to be qualified. But if you want just a yes or no, the answer would have to be no.

Q. Why do you say no?

A. Because of his failing health.

Q. Did you allow a man who handles the management of the real estate of C. Brewer and Company in connection with the matters that are involved in this law suit, even though you know was incompetent, to handle them, is that what you want to say?

A. We engaged able assistance in around 1941 to go into that office to relieve Mr. Merriam because of our concern.

Q. Yes, but was that because he was incompetent? A. Because of his—

Q. Oh, because of his health?

A. —because of his health.

(Testimony of P. E. Spalding.)

Q. You wanted to relieve him of some of the burden of the duties? A. Yes.

Q. You didn't consider him incompetent, did you? A. He was becoming incompetent.

Q. Well, did you consider him incompetent at the time [1912] these letters were written?

A. I certainly would consider that he was incompetent to have written letters such as that.

Q. You had assistants to know what he was doing in there?

A. We desired to have assistants.

Q. Well, did you at the time these letters were written? A. I don't know.

Q. Well, now—

A. —how he wrote those letters.

Q. —you think about it, please, so you can answer that question for me.

A. Well—may I have that question?

(The reporter read the question)

Q. That's the question, at the time of these letters that I asked you about.

A. In the operation of an office—

Q. I don't care about an operation of an office. I want to know specifically what I am asking you about. A. I can't answer the question.

Q. You can't answer it?

A. Not yes or no.

Q. Did you send assistants down to him that you mentioned to report to you on matters that he was attending to? A. No. [1913]

Q. Letters that he was reading? A. No.

(Testimony of P. E. Spalding.)

Q. You never went to that extent?

A. No.

Q. You left it to him? A. Yes.

Q. And let him carry on his business with the public and all the people that Brewer did business with? A. Yes.

Q. In the document marked Government Exhibit 12 for identification, being the letter of November 29, 1946, written to the Honolulu Plantation by Oahu Sugar in regard to these pensions it is stated in substance that the purchaser will assume no obligations in connection with compensation, bonuses or pensions due or payable to the plantation personnel on account of or arising for services performed prior to date of transfer of property to Oahu Sugar Company. Now, pursuant to that clause the Honolulu Plantation Company didn't have to pay out anything in addition after the date of this sale on account of those, did it?

A. Well, they had a moral obligation to these men who were not—

Q. Moral obligation? Yes, go ahead. Did you finish?

A. The moral obligation to these employees who were not being carried on the payroll. [1914]

Q. Who were not being carried on the payroll? Some men who had retired?

A. Some men who had retired. Some men who were not going to be employed by Oahu Sugar or be employed by the C. and H.

Q. As to all of the others, they assumed this

(Testimony of P. E. Spalding.)

continuing obligation on the retirement and pensions, the Oahu Sugar Company?

A. No, they did not.

Q. They didn't take over your pension system?

A. No, they very definitely rejected it.

Q. They rejected it, as I read it, for services performed prior to the date of the transfer of the properties to Oahu Sugar Company?

A. Yes. Oahu Sugar Company refused to assume any obligations on account of prior service.

Q. On account of prior services? Now, just what did that mean?

A. Well, it meant if there was any pension obligation, any separation pay, any other obligations that might be charged against Honolulu Plantation because of services prior to January 1, 1947, Oahu Sugar Company would accept none of that obligation.

Q. Then the pension obligations that had been established by Honolulu Plantation Company expired insofar as anything that Honolulu had originated, and also the retirement system at the [1915] date of this agreement, is that it? A. Right.

Q. And any pension system that was to be put in force was to be newly put in force by Oahu Sugar, is that it? A. That's right.

Q. Didn't you have a reserve established for these obligations that had already accrued pertaining to retirement and pensions?

A. We did not.

Q. You never established a cent of reserve for

(Testimony of P. E. Spalding.)

it? A. That's right.

Q. How much did it amount to, those liabilities that you pointed out here on account of services performed prior to the date of transfer of the property?

A. Well, there was no legal obligation that I understand.

Q. Well, that's what we want to get at. You brought that out. What do you mean there was no legal obligation?

A. There was no legal obligation on the Honolulu Plantation to pay any additional sums beyond the wages that became due at the end of December, 1946. But the company felt there was a moral obligation, and this is why they appropriated the sum of \$400,000 out of the sales money to meet that obligation. If it hadn't been for the fact that many of these employees were picked up by Oahu Sugar Company and many by C. and H., the obligation would probably have been much greater.

Q. Well, let's confine it to what it was. Four hundred you took out. Have you made up a statement of what you owe under that that you say there is no legal obligation, legal liability, to pay it? Is that right?

A. That's my understanding.

Q. You won't have to pay a cent out of the four hundred thousand as far as the legal obligation is concerned?

A. That's what I understand.

Q. Have you made up a statement to show what

(Testimony of P. E. Spalding.)

your moral obligation is that you will have to pay out of that four hundred thousand?

A. The statements are being made up. The accounts are being set up as to the different payments to the individuals.

Q. Yes, I understand. But you haven't made up such a statement yet? A. No.

Q. When do you expect to have it completed?

A. Within the next few days.

Mr. Rathbun: I ask that this be held open until we see that, if your Honor please, seeing that they brought this up, now. It's a very material question.

The Court: Very well. When you come back at the time we have this Congressional claim matter.

Mr. Rathbun: This can be held open also the same way as that is. I mean, I ask that that be done. [1917]

The Court: You will also come prepared to answer the question relating to this breakdown of this moral obligation that Mr. Rathbun is talking to you about.

The Witness: Do you mean a detailed statement of the amounts paid to each and every individual?

Mr. Rathbun: I want to know what you are going to pay those individuals out of that four hundred thousand.

The Court: That's apparently what he wants to know.

The Witness: The total amount?

The Court: The total to each individual.

(Testimony of P. E. Spalding.)

The Witness: The total sum paid?

Mr. Rathbun: I want it so we can understand it and cross-examine on it. It should be in detail, four hundred thousand. That's the estimate. That's all we have on that. I want to see it verified.

The Court: You want, then, for him to have information as to how much of the four hundred thousand is paid out and to whom and in what amounts.

Mr. Rathbun: Yes, your Honor, and the method that they are going to get it into the hands of those people. Something more than a promise. If that's the case.

The Witness: What you would like would be the receipts for the payments, I take it.

Mr. Rathbun: I want to know how much you are actually going to pay out of that four hundred thousand. [1918]

The Witness: I may be able within the next few days give you the amounts paid out, the total amount actually paid. Nothing that we are going to pay—

Mr. Rathbun: You don't have to do it within the next few days. You can do it when we bring up this subject exhibit that we are waiting for.

The Witness: I hope we can pay it within the next week, and I will have the exact amount paid out.

Q. Now, you say this sale included growing crops of a million dollars approximately?

A. Yes.

(Testimony of P. E. Spalding.)

Q. What do you base that on?

A. On the value of the growing crops and the amount recovered from it.

Q. Just from memory or something that's been made up in the line of a statement? You wouldn't guess about that subject in selling them, would you?

A. I can approximate it very quickly without having any statements.

Q. Under the terms of this sale is there to be an inventory or a bill of sale of those crops?

A. No.

Q. There is not? A. No.

Q. Will you please give me the crops that were on each [1919] field on the lands remaining after the takings in these cases?

A. No, I can't possibly do that.

Q. How close could you come to it?

A. I can give you an approximation of the sugar that's available for harvesting this coming year.

Q. I want you to take it field by field.

A. I can't do it.

Q. Have you ever done it?

A. I have never done it.

Q. It can easily be done, can't it?

A. By those who are acquainted, by the fields.

Q. Yes. I assume you are acquainted with them when you estimate a million dollars as the price of the crop, the value of it.

A. There are assumptions in error—your as-

(Testimony of P. E. Spalding.)

sumption is in error. I am not familiar with each field and the crops on it.

Q. Well, then, what do you base your million dollars on? A. On the total crop.

Q. Well, how do you know what the total crop is if you don't know the details of the fields?

A. You don't need to know the detail of a field.

Q. You have to add them up to get the total?

A. No, I can get a report and estimate of the total [1920] acreage to be harvested and the approximate estimated sugar per acre.

Q. Yes, but you haven't got that at the present time and you haven't had any such thing before you, is that right? A. No, not in detail.

Q. Do you have any statement before you as to the cost of producing those crops to arrive at a value of a million dollars on them?

A. In making a sale such as this, the cost of producing them has no—is of no effect because the purchaser has acquired those crops in the condition that they exist without having had the expense of producing them.

Q. I understand that perfectly, Mr. Spalding. That is not the purpose of my question. The purpose of my question is to find out whether or not you realized a million dollars for these crops. In other words, you are testifying to this million dollars as the value of the growing crops to show what you gave out in this case in return for the money that you got in this sale, is that right?

(Testimony of P. E. Spalding.)

A. The value of the growing crops.

Q. Yes.

A. What the purchaser figured, how they estimated them, I don't know.

Q. I don't ask you how the purchaser estimated them. That isn't my question at all. Before you'd know how much [1921] Honolulu Plantation Company could value those crops at from the Honolulu Plantation's standpoint, you'd have to know how much it cost to produce them, wouldn't you?

A. If you were going on as a going concern, yes.

Q. Yes, of course.

A. Yes. If you are going on in operating, then that's another matter.

Q. Have you had any such statement before you before you testified to this estimate of a million dollars as to what it cost to produce that million dollars' worth?

A. I can give you the way I estimated, if you'd like.

Q. I asked you if you have a statement that we could look at.

A. No.

Q. You never had?

A. No.

Q. Approximately what would be the cost of producing that million dollars of sugar?

A. Well, you find in these annual reports the amount invested in growing crops, which is the—

Q. I'm asking you. You testified to a million dollars. What would be the expense now to produce that million dollars' worth of sugar?

(Testimony of P. E. Spalding.)

A. The expense that exists to produce that million dollars develops roughly this way: there's about 15,000 tons of sugar [1922] available for harvest—

Q. I didn't ask you how it develops. I'm asking you what it is, if you know, the amount of it.

A. The amount is about a million dollars.

Q. It cost you a million? A. No.

Q. Well, that's what I'm asking you about.

A. It cost the purchaser nothing to—

Q. I'm not asking you what it cost the purchaser. I'm asking you what it cost the Honolulu Plantation Company to produce that million dollars' worth of sugar or cane.

A. Your question, the total value of the crop is nearer a million eight hundred thousand and it cost about eight hundred thousand dollars to produce, leaves you about a million dollars.

Q. Now you want to change your statement from a million to a million eight hundred thousand? A. No.

Q. Now you are saying a million eight hundred thousand is the value of the crop?

A. No, I say a million dollars is the net value of the crop. And you want to get it back to the cost of production, then you've got to take the gross over-all. I'm talking of the net figure.

Q. You didn't say net in your direct examination, did [1923] you?

A. I didn't use the word net.

Q. I didn't hear it.

(Testimony of P. E. Spalding.)

A. I didn't use the word net. I just used the value of the crop.

Q. But it's still just an estimate as far as having any detailed figures in front of you is concerned?

A. Yes.

Q. Now, you said it cost about eight hundred thousand to produce a million eight hundred thousand worth of crops. Have you got any statement in front of you to show the details of how you arrived at that figure, such as you have amended it now?

A. Exhibit 1944 will show the cost of the money invested in growing crops, which you will find is very close to eight hundred thousand dollars.

Q. Is that all you had, what's in the annual statement? That's all you had before you in giving that opinion as to value?

A. That's plenty.

Q. Never mind as to whether it's plenty. Yes or no?

A. Yes.

Q. Will you point out for me on this document marked Honolulu Plantation Exhibit 13-U, where the item of eight hundred thousand dollars can be ascertained? [1924]

A. Here is growing crops for '45, '46, that total.

The Court: Louder.

A. Growing crops total. (Indicating)

Q. That's assets, isn't it?

A. That's the value of the growing crops.

Q. That isn't the cost of the crop?

A. That is the money invested in growing crops,

(Testimony of P. E. Spalding.)

direct charges against the production of the growing crops for '45 and '46.

Q. In other words, you carry the value of the crop on your books where you're showing on your balance sheet the assets?

A. The money invested.

Q. The money invested as being the value of the crop, is that it? A. That's right.

Q. What does the statement on the blue sheet attached to that exhibit on the first page of the blue sheet under the heading of cost of 1944 crop mean?

A. That means the cost of the nineteen forty—if you look at '43 you will find on the end—

Q. I'm looking at '44 now. What's the million four hundred sixty-five thousand odd dollars?

A. You mean the four million four hundred sixty-five?

Q. Yes. Under the heading, cost of 1944 crops.

A. The preparing of the land, cultivating, fertilizing, harvesting, and trash disposal, including cane and raw sugar purchased.

Q. Yes.

A. There's allotted 50,000 tons approximately of raw sugar purchased there; it's included in the figure, and the cost that went into the production of the '44 crop of prior years.

Q. In other words, you are starting way back at the point you first got a lease on a piece of raw land and charging up? A. No, no.

Q. Charging up? Just a minute. Charging up

(Testimony of P. E. Spalding.)

the preparation of the land, the clearing up and plowing of it, is that right? A. No.

The Court: Just a minute, all of you. Let the question be stated. Mr. Witness, when there is an objection coming, I don't want you to answer the question. What is your objection?

Mr. Vitousek: My objection, if the Court please, is that counsel is interrupting the witness when he is answering questions. He is entitled to finish his answer.

The Court: Both of them have been interrupting one another and going so fast nobody could get in between them. [1926]

Mr. Vitousek: If the Court please, we submit that counsel for the Government interrupted Mr. Spalding when he was explaining what those figures were on the blue sheet and starting at something else.

Mr. Rathbun: I thought Mr. Spalding was through. If he wasn't saying something else, what that item of four million odd dollars is made up of.

A. It's all there in writing just what it was made up of.

Q. That says preparation. A. Yes.

Q. Of land. A. Yes.

Q. What does that mean?

A. That means plowing and planting of seed for crop, fertilizer, the setting up of your irrigation system, and all that work for the starting of a crop.

(Testimony of P. E. Spalding.)

Q. Then the four million four hundred sixty-five thousand dollars was all cost that accrued in the year 1944?

A. No. I have been trying to tell you that in the starting of a crop of cane, the cane is from 18, 20, 22 months old at the time of harvest. It's all the expenses that are applied against the growing of that crop from the time it was started until it was harvested.

Q. Just the 1944 crop? [1927]

A. The 1944 crop.

Q. In other words, an original planting, you're going back to the original planting of the crop which will mature in 1944, is that it?

A. All your plant costs, any crop that is planted and harvested. The plant costs are included in the cost of that crop. Then you ratoon it, ratoon costs appear in that cost of the crop also.

Q. Yes. That's true. A. That's all.

Q. That didn't take place in 1944, did it, all those items?

A. Some of them took place in 1942, some in '43.

Q. If it's a 20-year cycle—it went back as much as 20 months?

A. Twenty, twenty-four months. Plantation accounts will run on a crop basis.

Q. Are you through? A. I'm through.

Q. What did you mean by manufacturing expenses in that?

(Testimony of P. E. Spalding.)

A. The cost of manufacturing this crop during the current year '44.

Q. Yes? A. Into sugar.

Q. Just strictly in 1944? [1928]

A. Strictly 1944. The operation of producing that sugar was all done in the calendar year '44.

Q. What are the sundry expenses of three hundred fifty-four thousand odd dollars?

A. Well, what they are, I am sure I don't know. I'd have to go back to the statement to find out what they are.

Q. You can't tell me now? A. No, no.

Q. What can you tell from going back to this statement?

A. Let's see. Disbursements, here's an item, supply and sundry account. I can't tell you what that three hundred fifty—

Q. You can't tell me what it is?

A. No. It includes all the costs charged against the crop except those that are detailed here.

Q. Well, but what are they?

A. I don't know. Maybe hospital.

Q. You haven't any idea? A. No.

Q. You never tried to find out? A. No.

Q. As the President of the Company?

A. No.

Q. You read this report?

A. I should say. But we have a treasurer and accountant [1929] to handle that.

Q. You read this report before it was filed?

A. I read it, yes. Incidentally, I am not Presi-

(Testimony of P. E. Spalding.)

dent of the Honolulu Plantation Company. I am not.

Q. You are President of C. Brewer and Company, though. That's what I mean always when I refer to the President. A. Oh, yes.

Mr. Rathbun: That's all, your Honor.

The Court: Any further questions of the witness?

Mr. Vitousek: We have further questions. Do I understand, now, that Mr. Spalding was asked to produce something in addition?

The Court: Yes, he is coming back at a later date when this Congressional claim matter is about to be cleared up, and at that time he is going to bring with him, in answer to Mr. Rathbun's questions, about the paying out of this four hundred thousand dollars taken out of the sale price to cover pensions and retirement.

Mr. Vitousek: Do you have a note of that?

The Witness: I have a note of that.

Mr. Vitousek: If the Court please, there are a few questions I'd like to ask on re-redirect that were brought up. There is one question I neglected to ask on direct that I'd like permission to ask—on cross-examination—in regard to what was brought out, that certain amounts have been expended [1930] on the lands we claim were covered by this lease of Damon Estate. I want to bring out what those were, which should have been asked on redirect.

The Court: Any objection? In other words, he

(Testimony of P. E. Spalding.)

is asking for permission to ask out of order what he should have asked.

Mr. Rathbun: I get that, but I don't get the subject of what he is going to ask.

The Court: Well, I gather from what he asked that it must be with regard to those things you marked for identification.

Mr. Vitousek: There are two questions, if the Court please, two questions I want to bring out. One is on how the rentals were paid during this period after the expiration of the written lease. The other is the expenditures he meant, what they were for on these lands. That's the nature of the questions that I want to ask.

The Court: All relating to this Exhibit 9-K, the Damon lease?

Mr. Vitousek: Yes, all relating to that.

The Court: Certain letters marked for identification?

Mr. Vitousek: And the letters marked for identification. I had it on my notes.

The Court: Any objection to the out of order questions?

Mr. Rathbun: Well, except the purpose of it, if your Honor please. I don't see any material purpose for it yet.

The Court: Well, let's proceed and maybe we can see it [1931] clearer. I will allow the questions so far as being out of order is concerned.

Mr. Rathbun: I have no objection to that part.

The Court: State the questions.

(Testimony of P. E. Spalding.)

Redirect Examination—(Continued)

By Mr. Vitousek:

Q. Mr. Spalding, yesterday on cross-examination you mentioned spending certain monies on the Damon land. What were they expended for?

A. Expended, were for the planting of new crops of cane over the lands that were leased, and also the improvements to the water supply, flumes and ditches supplying that land. I imagine the expenditure was somewhere in the neighborhood of \$75,000 and covered the planting and the flume repairs, and so on.

Q. Now, was that planting a new crop?

A. That was planting of a new crop. That was the purpose of obtaining the extension of the lease, because your planting generally covers the crop and two to three ratoons for a period of seven to nine years.

Q. Now, was rental paid for the land by Honolulu Plantation to Damon Estate?

A. We continued to pay rent right straight up to 1946.

Q. On what basis?

A. We were billed by the Damon Estate, on the land [1932] remaining, and we paid it quarterly.

Q. The rentals specified in the written lease and rentals specified in the letters are different.

A. Oh, it's paid on the basis of the letters.

Q. Mr. Spalding, in regard to the cost of crops,

(Testimony of P. E. Spalding.)

referring to the 1944 report, as I understood part of the costs were on accrual basis and part on a calendar year basis?

A. Yes, well we—in all our plantations we use a crop accounting basis which includes the cost of bringing that crop to maturity and harvesting and milling it and all the expenses that occur up to the time it is made into sugar.

Q. Now, then, in 1944 the crop would be the crop manufactured into sugar in '44?

A. Manufactured in the calendar year.

Q. '44? A. '44.

Q. But that might have been started a long time prior?

A. It might have been started in '42.

Q. That in addition to preparing land, planting, cultivating, fertilizing, harvesting, trash disposal, is manufacturing expense?

A. Harvesting, transporting the cane to the mill, and manufacturing.

Q. Now, when is that likely to occur?

A. That occurs within the calendar year of the crop. [1933]

Q. And the total—do you have other costs?

A. Your taxes, your rent, your leases, charges, other expenses which would be charged in that calendar year occur annually.

Q. Now, then, the crop that was sold under this agreement of sale on these exchanges of letters to the Oahu Sugar Company, as far as accounting practices would be, is known by what year, calendar year?

(Testimony of P. E. Spalding.)

A. It would be the crops for 1947 and '48.

Q. 1947 and '48?

A. 1946 annual report would show the cost, the money invested in growing crops that were in the field, and they would be for two years.

Q. Then the amount shown in the '44 report, say for the '45 crop, would be with the cost up to the end of the year put into that crop?

A. Yes.

Q. Might have occurred for more than a 12-month period? A. Oh, yes.

Q. Do you know, can you state the amount of those costs that had accrued as of January 1, 1947, for the crops sold Oahu Sugar Company?

A. No, those exact figures have not been prepared.

Q. Could you get those?

A. It would be a little time until the final accounts [1934] are prepared.

Q. When you stated you could give the method that you used in arriving at this million, can you give that method? A. Yes.

Q. Will you do so?

A. Roughly, it is 15,000 tons of sugar available for harvest for production in 1947. The price of raw sugar is \$120 a ton. That means a gross value of a million eight hundred thousand dollars. In order to recover that money, the buyer merely has to pay the cost of harvesting, transporting, milling his cane into raw sugar, and marketing. Those costs would be around 40, \$45 a ton of sugar, which

(Testimony of P. E. Spalding.)

would mean that the cost to Oahu Sugar Company is somewhere between six and seven hundred thousand dollars, to realize a million eight hundred thousand.

Q. So when you were referring to the cost before, from the price, you were not considering the cost accrued?

A. Not the cost accrued. What the buyer was going to get and how much I could get out of it.

Q. Well, what the cost would be to the buyer to put the cane in a marketable condition, the sugar?

A. Yes. He would have a certain small amount, irrigation, in this year on the crop to be harvested at the end of the year. But allowing a very generous figure is at least a million dollars net. [1935]

Q. Was Mr. Merriam continued in the employ of the company?

A. No. He broke down completely in the summer of '44 and he was retired and he is on pension now. He is living in Kula, Maui.

Q. After he retired, do you know when was that—the summer—

A. Well, he left in the summer of '44 to go to Kona at the time to regain his health. And he was only there a short time. Things were apparently very bad. He came back to Honolulu. He was in the hospital quite a bit of time. and, well, he became mentally deranged.

Q. What hospital? A. Kaneohe.

Q. And later discharged?

A. Later discharged. They performed one of these new operations, an incision of the brain, and it seemed to bring him back somewhat, so he is quite normal and living comfortably on Maui.

Mr. Vitousek: If the Court please, except for possible re-redirect on further testimony brought out by Mr. Spalding, when he comes back, why we have no further questions.

The Court: All right.

Recross Examination—(Continued)

By Mr. Rathbun:

Q. When did Mr. Merriam actually leave the employ and cease his duties with C. Brewer and Company?

A. He was retired January 1, 1945.

Q. Up to that time he had been carrying on as usual?

A. No, he ceased his duties completely six months before that.

Q. That would be in the middle of—

A. '44.

Q. —of 1944?

A. We had him hospitalized at that time and we carried him on our full salary roll until the end of the year.

Q. But up to that time he had been carrying on his duties with C. Brewer and Company?

A. Rather intermittently.

Q. Well, now, what do you mean "intermittently?"

A. I mean he was there occasionally and he

(Testimony of P. E. Spalding.)

had been off and sick and in the hospital. He'd be away for two and three weeks at a time.

Q. But he was able to carry on his duty that he was assigned to, is that it?

A. Not very well.

Q. Well, you allowed him to work, didn't you?

A. We tried to keep him at work. We tried to keep him, mentally O.K., to keep him there. [1937]

Q. You allowed him to operate as the manager of the real estate department, didn't you?

A. We allowed him to retain that title.

Q. You didn't change his title as far as the public was concerned? A. Certainly not.

Q. You didn't give them any notice of the fact that he was in any condition other than that of a competent man, did you? A. We tried not to.

Mr. Rathbun: That's all.

The Court: Very well.

Mr. Vitousek: If the Court please—

The Court: You are excused, subject to being called.

Mr. Vitousek: May he be excused?

The Court: Yes, I just excused him.

(Witness excused)

Mr. Vitousek: As far as the Plantation Company is concerned, we have no further evidence except what may be occasioned by what may develop and cause an answer, that may require testimony from others if this exhibit comes in, this Exhibit 1. And except for that, why we would be ready to close.

The Court: Well, that would come in on rebuttal, if at all, would it not?

Mr. Vitousek: Well, it could be. I am frank to say that [1938] these exhibits coming for identification, coming in for identification, would seem to me that properly speaking we should wait until they are in and then offer rebuttal, although we have gone out of order in some of it. But I say, it's just reserving in regard to that question. Otherwise, we are ready to close. And what other redirect may be caused on further cross-examination of Mr. Spalding.

The Court: Have you abandoned your request to be allowed to recall Mr. Austin?

Mr. Vitousek: If the Court please, Mr. Austin is out of town. I might state what we proposed to recall him for was simply to introduce a copy of that black book he had on the stand. It's been read in the record but apparently read so many times that I couldn't find a consistent figure. That's all we were going to recall him for. But I don't think it's important enough to hold the case open. If he's here, I'd just like to put that in. He was called to the other islands on duty and that was the only purpose of recalling him, is to have a copy of that page put in the record.

The Court: Well, then, subject to Mr. Spalding being recalled when this Congressional claim matter is again before us, and the retirement business, you are resting?

Mr. Vitousek: That's right, if the Court please. And reserving the right, of course, that I imagine

will come in rebuttal, to answer on the claim if it's necessary. [1939]

The Court: How do you stand?

Mr. Rathbun: We'll take a very short time. I estimate we'll finish in one morning court session. I therefore ask that we be allowed—we are operating under the handicap of no transcript. We have ordered it but it seems that it can't be gotten out. And I'd like to go over the material that we have from our notes, which we'll have to do, and I think I can assure your Honor that we can finish Tuesday morning with everything that we have in the line of evidence.

The Court: That's good to know. So far as planning is concerned with regard to other cases, supposing the Government finishes Tuesday morning, how much rebuttal do you think you will have? In other words, I am trying to get an idea how much longer this case is going to take.

Mr. Vitousek: Of course, if they finish it in one morning, I don't imagine we'll have very much, if any.

Mr. Rathbun: I'll tell you frankly. There's no use of hiding it. We are offering no evidence on the severance claim. It's strictly on the improvements, part of which we concede and part of which we don't agree with their values on.

Mr. Vitousek: On that basis, if the Court please, I doubt if we'd have any rebuttal. My only case of rebuttal is in case there was something on the severance claim. Either in that or on the matter in connection with it, like going into the reports.

The Court: Well, there's an expectation, then, that we might finish at least by Wednesday?

Mr. Rathbun: Yes.

Mr. Vitousek: I might state to the Court, it's going to be very difficult. I'm having the same difficulty Mr. Rathbun has. We want to get the transcript of certain of these witnesses, and the reporter is busy. But I think we would like to finish it.

The Court: The Court is busy and the court reporter is busy, and the Court is going to keep him busy. The Court is having a little difficulty with the reporter situation. But there is something else I was going to ask. Will you be able to tell me on Monday what expectation there is of getting an accurate copy of this Congressional claim before us?

Mr. Vitousek: Well, if the Court please, I could on Monday afternoon. Tuesday, as Mr. Rathbun is suggesting. I want to go to one of the other islands for a little rest perhaps and perhaps be back Monday morning, but I will know by this afternoon, I'm quite sure.

The Court: I didn't understand you were asking that it go over until Tuesday.

Mr. Rathbun: Yes, I suggested that because we've got to go over all this testimony in our notes, which will take some time.

The Court: On that Congressional claim confusion, I am wondering if we are going to get into more confusion. I can [1941] conceive of it being possible that you would produce an accurate

copy of what was filed with the Committee of the last Congress and then later contending that during the course of that Committee hearing the claim certain amendments were made. Then we will have to send back to Washington for those.

Mr. Vitousek: That's just what I anticipated.

Mr. Rathbun: It won't, as far as I am concerned. If they will admit that this document was filed, which I think is going to be the case, then at a later date they filed something new before the Senate Committee, which is I think this situation, I don't care anything about that. I want to know whether this was filed. Of course, if this was not filed and a new one in its place was filed, then we'll have to see what the difference is, whether there is a material difference.

Mr. Vitousek: That's where we may get into difficulty. I have talked with counsel to find out the purpose. We might iron it out. But if it develops on the accuracy, we may be in this difficulty. As I understand on these matters, when a document like this is admitted, it is admitted subject to correction. In other words, they reserve the right to substitute matters they may find incorrect. And that is what must have been done, because I find differences in copies that are here. If that is so, it would be the final correction, the final correct one is the document Congress receives, as I understand it, and that's where it may take a little time. [1942] It may be that we can save that time. That's a confusion I see.

The Court: I don't know, but there must have

been something that was originally filed with Congress and that something is what Mr. Rathbun apparently wants.

Mr. Rathbun: I don't know. I'm not saying. The way the situation looks to me, I think this document was filed with the House of Representatives. And I think Mr. Kay will agree with me, as a guess on that. Then when it got into the Senate, you filed some kind of an amendment or extension to it.

Mr. Vitousek: If the Court please, I don't like to appear as not knowing but I didn't know anything about that claim. All I know is what I gather from what we call hearsay evidence.

Mr. Rathbun: That's all I know about.

The Court: That's apparently the stage in the situation which we must leave it until you get some further specific, accurate information. All right, we'll adjourn this case until Tuesday at nine.

(The Court adjourned at 11:10 o'clock, a.m.)

Honolulu, T. H., January 14, 1947

The Court: Civil No. 514, United States of America versus 257.654 acres of land, more or less, and others; case called for further trial.

The Court: Are the parties ready?

Mr. Vitousek: Ready.

The Court: I believe Mr. Spalding was to come back with—

Mr. Rathbun: He furnished the other two things. One was a breakdown and the other was an agreement, a sale agreement.

The Court: But there was one other thing you asked him to bring, a pension detail.

Mr. Rathbun: He said that will take several days.

The Court: That's right. Now, what is the progress on getting a copy from Washington of what is filed with Congress?

Mr. Vitousek: Well, I was informed by telephone yesterday that it was mailed Saturday.

The Court: Air mailed?

Mr. Vitousek: Air mailed. So it's in the hands of Uncle Sam.

The Court: It ought to be here today, shouldn't it?

Mr. Vitousek: He said it would be here yesterday—in a day or so.

Mr. Rathbun: I think we can proceed and come back to that.

The Court: All right, subject to those two matters being [1944] reserved, all the other details that were left pending in your case are cleaned up now, except those two?

Mr. Vitousek: Yes, if the Court please.

The Court: All right. You rest, subject to those two points?

Mr. Vitousek: Yes.

The Court: And you, Mr. Rathbun, may start your case at this time.

Mr. Rathbun: **Mr. Child.**

The Court: Do you have an opening statement you wish to make?

Mr. Rathbun: No, your Honor.

JOHN FRANCIS CHILD, JR.,

a witness in behalf of the Petitioner, being duly sworn, testified as follows:

Direct Examination

By Mr. Rathbun:

Q. Will you state your name, please?

A. John Francis Child, Jr.

Q. Where do you live, Mr. Child?

A. I live at 1334-A Pensacola Street, Honolulu.

Q. Were you born in Honolulu?

A. I was.

Q. How old are you? A. I am 34. [1945]

Q. What is your general education?

A. I was educated in the schools in Hawaii, went to Punahou Academy, took a college preparatory course, and attended the University of Pennsylvania, Wharton School of Commerce, where I majored in real estate and appraising; graduated with Bachelor of Science, in Economics, in 1935; taken certain case study course in appraising given by the American Institute of Real Estate Appraisers at the University of Michigan, Detroit, in 1940.

Q. Have you had connection with any local institutions or business houses during your career?

A. Upon graduation from school I worked for the Union Trust Company of Honolulu in connection with reorganization of their real estate department, after it was taken over by the Bank Examiner. Following that, I set up my own office.

Q. Did you do any appraisal work in connection with that Union Trust work?

(Testimony of John Francis Child, Jr.)

A. Yes, we revalued properties in connection with the mortgage loans.

Q. Properties located where?

A. In and around Honolulu.

Q. All right. What next? What years were those that you were with the Union Trust organization?

A. Latter part of 1935 and the first part of 1936; in 1936 I started my own business in which I did appraisals for [1946] clients and various types of business research work.

Q. Have you been in the real estate business, general real estate business?

A. I have been in the real estate business since 1940.

Q. Of what nature of appraisals did you work on when you went in business for yourself?

A. During the early periods, why I did chiefly residential appraisals. After the war started I became a staff appraiser for the United States Navy Real Estate Division, appraised property being taken in connection with various acquisitions by the Navy, the majority of which were agricultural properties, small farms, cane lands, waste land and fish ponds.

Q. Are you a member of any boards or local committees pertaining to real estate?

A. I have been a member of the Honolulu Realty Board since 1937.

Q. Do you occupy any office in the Realty Board at the present time? A. I am the President.

(Testimony of John Francis Child, Jr.)

Q. All right. What else?

A. I have been on the Board of Directors for several years and a member of the Appraisal Committee of the Honolulu Realty Board during 1946.

Q. Anything else? [1947]

A. Well, I have been Chairman of the Educational Committee. I have been—

Q. What is the Educational Committee?

A. The Educational Committee of the Honolulu Realty Board, education along real estate lines of the members.

Q. Yes?

A. I have been a member of the Chamber of Commerce, Vice Chairman in their Redevelopment Committee. I have been a member of the Land Planning Committee of the Territorial Planning Board while it functioned between 1939 and '41.

Q. Anything else?

A. I am a member of the Society of Farm Managers and Rural Appraisers, which is a national organization, American Marketing Association, and the American Statistical Association, all national organizations.

Q. Name some of the people that you had made appraisals for during the period since 1936?

A. I have made appraisals for the Honolulu Finance and Thrift Company, the Discount Corporation, Pioneer Building and Loan Association, Mid-Pacific Institute, Government employment, Land Department of the U. S. Department of Justice, Bureau of Yards and Docks, U. S. Navy,

(Testimony of John Francis Child, Jr.)

U. S. Army Engineers Real Estate Division, Honolulu, U. S. Federal Public Housing Authority, Honolulu, Attorney General of the Territory of Hawaii, Board of Water Supply of the City and County of Honolulu, City and County Attorney.

Q. In Civil 521, are you familiar with parcels 2-A and 2-B in that case?

A. If you mean the two kuleanas belonging to the Honolulu Plantation Company, I am.

Q. I'm trying to find them on here but I can't find them yet. (Referring to a map) What were the areas of those two pieces that you are familiar with owned by the Honolulu Plantation Company?

A. Parcel 2-A is approximately 47 hundredths of an acre; parcel 2-B, .107 acres.

Q. Will you step down here, to save time? May he step down here, to save time?

The Court: Yes. You have in hand the map attached to the petition?

Mr. Rathbun: Yes, your Honor.

Q. Point out the two pieces that you are referring to?

A. This, a long narrow part over here (indicating) is 2-A, as I understand it, and this parcel is 2-B, this being .47, 47 hundredths of an acre, and this being .107, .107 acres.

Q. And those are the only areas on that map that you are looking at of that acreage, is that right? A. That's right.

Q. And it is shown on Exhibit B attached to

(Testimony of John Francis Child, Jr.)

the petition for condemnation in that case, is that right? [1949]

A. That's right.

Q. Will you describe those two pieces of property, Mr. Child?

A. 2-A consists of a long narrow kuleana, averaging probably 35 feet in width and approximately 600 feet long. It extends from the base of the rise of McGrew Point into the swampy area adjacent to the point. A small portion of it is dry arable land, and the remainder is in swamp and reeds.

Q. What proportion of it is in swamp? Or was in 1944?

A. I have estimated that about .273 acres would be in the swamp and about .18 hundredths acres would be where there was fresh water seepage suitable for wet agricultural and about .017 acres of dry arable land.

Q. When were you on these properties?

A. I was on these properties in February, 1944.

Q. Did you see them after that, in July of '44?

A. I saw them a number of occasions after that, to and including July, 1944.

Q. From your knowledge of those properties, did you form any opinion as to their fair market value in the month of July, 1944?

A. I did. The value of the property known as 2-B being approximately a hundred dollars.

Q. What about 2-A?

(Testimony of John Francis Child, Jr.)

A. I haven't described 2-A. Shall I go ahead with the [1950] description of that?

Q. You described 47 hundredths of an acre?

The Court: He has been talking about 2-A.

A. 2-A is a hundred dollars, in my opinion, the fair market value.

Q. Both of them a hundred dollars, is that it?

A. No, 2-B I have given a value of seventy-five dollars.

Q. Did you have an opinion at that time as to the highest and best use for which this property could or should be used?

A. In considering the highest and best use of the two kuleanas, the 2-A was a long, narrow, portion which did not lend itself to any independent use other than the use of the land adjacent to it. 2-B was a very small area which also only lent its use, lent itself to the uses of the surrounding lands.

Q. Will you give the Court your reasons for those valuations, what you base them on?

A. In connection with 2-A I considered that the area of arable land was usable together with the adjacent areas, arable land, and the portion which was suitable for wet agricultural was similar to a lily pond area adjacent to it, and the balance of 2-A was unusable land without further improvement and was swamp. I gave the arable land \$700 an acre, the wet agricultural land \$400 an acre, and the swamp land nominal \$50 an acre. These rates are based upon \$700 an acre, the highest and best use of the other land in McGrew Point for pur-

(Testimony of John Francis Child, Jr.)
poses of subdivision, [1951] and the current or the price at that time of wet agricultural land, which averaged \$400 an acre.

Q. Well, these lands taken alone, in your opinion, did they have any subdivision value standing alone by themselves? A. They did not.

Q. How were they located in relation to the level of the street, the highway, Kam highway?

A. Parcel 2-A was located below the level of Kam highway.

Q. How far below?

A. Approximately three to four feet.

Q. All right.

A. Parcel 2-B was located above Kam highway, some 15 feet probably.

Q. What about access?

A. They had no access other than the usual access accorded the kuleanas in the Territory.

Q. What's that?

A. A trail over other property. They had access over other property but it was limited.

Mr. Rathbun: May he step down again, your Honor?

The Court: Yes.

Q. Referring to Civil Suit 529 now, are you familiar with parcels F-1 and F-2 in this proceeding, Civil 529? A. I am. [1952]

Q. Will you point them out on the map marked Exhibit D attached to the motion for an order amending the petition in this case, which motion was filed September 17, 1945?

(Testimony of John Francis Child, Jr.)

A. Parcel F-1 is this parcel with 77 hundredths of an acre in area. (Indicating) Parcel F-2 is this parcel down here.

The Court: Containing?

A. .857 acres.

Q. Now, are those two parcels, F-1 and F-2, contiguous to each other or are they removed from each other?

A. They are removed from each other.

Q. How far about?

A. One is in the center of, near the center of the land being taken, makai of the highway.

Q. How many feet would you estimate it?

A. Roughly 650 feet.

Q. Now, what intervenes between them?

A. In between are lands of other owners.

Q. What character of lands, large tracts or kuleanas or what?

A. Chiefly a large tract of land. There are some other kuleanas belonging to McCandless Estate.

Q. Do you know whether or not those other lands intervening are separate ownerships from the ownership of F-1 and F-2? [1953]

A. They are separate.

Q. And who owns F-1 and F-2, if you know?

A. The Honolulu Plantation Company.

Mr. Rathbun: Your Honor is familiar with this in memory where it is located, 529?

The Court: I'd have to see the map to refresh

(Testimony of John Francis Child, Jr.)
my recollection. Let me have that exhibit. (Mr. Rathbun hands a map to the Court)

Q. Will you describe, first, when did you see that property, Mr. Child?

A. Well, I visited the property for the first time in July, 1945, and several times subsequent to that. The last time being December, 1945.

Q. What is the date that the Government took the property? Do you know? Well, the suit was filed October 4, '44. Did you see it at that time?

A. I had not seen the property at that time.

Q. And what month was it that you saw it after that? A. In July, 1945.

Q. Did you make any investigation to find whether the character of the property had changed any in the meantime from 1944? A. I did.

Q. What did you find?

A. At that time the Navy had taken possession of the [1954] property.

Q. At what time?

A. In July, 1945. It was occupying it.

Q. Yes?

A. The character of F-1, land after investigation was found to be approximately the same. One of the buildings, the pump house, was still on the property. The character of F-2 was approximately the same with some fill having been pushed down on it by bulldozers.

Q. What improvement did you find on the property when you saw it?

A. At the time I visited the property there was

(Testimony of John Francis Child, Jr.)

a pump house built of corrugated iron with concrete foundation and having an area of approximately 540 square feet; the roof siding with corrugated iron; and there was a concrete floor below the level of the surrounding ground which was heavy concrete for the purpose of mounting pumps.

Q. Were there any pumps or machinery in the building?

A. At the time I visited there was a pump in operation by the Navy.

Q. Did you find out whether or not that was the same pump that had been in there when the property was taken in 1944?

A. I asked the Navy person in charge, who said that it was a Navy pump. [1955]

Q. Not the same one, then?

A. Not the same one.

Q. All right. Go ahead and describe what else you found on the property?

A. My investigation revealed that there were—there was a dwelling on the property of approximately 480 square feet.

Mr. Vitousek: I didn't get that first part, a building?

A. A dwelling used in connection with the attendant for the pump when the pump was being used. And several miscellaneous storage sheds which had been removed.

Q. Did you get any information as to how big those sheds had been before they were removed?

A. They were small wooden sheds. The infor-

(Testimony of John Francis Child, Jr.)

mation that I obtained, they were miscellaneous sizes. I don't know how large they were. The information was secured from secondary sources. I didn't see the sheds.

Any thing else on the property?

A. The property also had some four wells. These wells were connected to the pump house by a tunnel arrangement.

Q. Describe the wells in a general way as you saw them?

A. I didn't investigate the wells. That is, I didn't look into them. I merely noted that they were there.

Q. Did you know the purpose that they had been used for before that?

A. In talking with Honolulu Plantation office employees, [1956] I determined that those wells had been used in connection with the irrigation system for that property and property above, that when a source of water was available from the Hawaiian Electric Company that the wells were no longer used in connection with this irrigation system.

Q. Which tract were those wells located on, F-1 or F-2? A. They were located on F-1.

Q. Was there any access to these properties, F-1 and F-2?

A. The access at the time I visited was over a road across other lands belonging to the Bishop Estate from the Kam highway.

Q. Well, what kind of road, dedicated road?

(Testimony of John Francis Child, Jr.)

A. No, this road was merely a road put in for the convenience of the plantation. It was not a dedicated road and was titled, belonging to the Bishop Estate. It did belong to the Bishop Estate; at the time I visited it, it was after the Navy had filed.

Q. Did you form an opinion, looking at this property, as to its highest and best use in 1944?

Mr. Vitousek: If the Court please, this question says "the property." I don't know whether it was meant to cover the land or the improvements.

Mr. Rathbun: The property as a whole.

Mr. Vitousek: Then we wish to interpose an objection. [1957] If it is meant to cover the wells and other such improvements, this witness has not been qualified to testify in regard thereto. His qualifications relate first to a real estate man, as to the lands, to the buildings perhaps. But in this particular case it is shown that he knows nothing about the buildings except what he was told, with the exception of a corrugated iron house over the pump; that he made no investigation of the wells except to see what they were on the surface. As to what they were underneath, he is not qualified as an engineer to give any opinion in regard to these particular wells. In view of the statement that it covers everything, we raise the objection.

Mr. Rathbun: He doesn't have to be an engineer to testify on that subject. The very fact that he is not an engineer, a real estate man, the ques-

(Testimony of John Francis Child, Jr.)

tion of the highest and best use will bring out that he disregarded the wells as a real estate proposition.

The Court: On the point of the wells, I am inclined to think that the objection may be well taken. However, I am going to overrule it and the witness may answer the question, and you may have an exception.

Mr. Vitousek: Yes.

The Court: Do you have the question in mind?

The Witness: I do.

The Court: You may answer it. [1958]

A. I have formed an opinion. In my opinion the fair market value—

The Court: Excuse me. The question was the highest and best use.

A. I'm sorry. The highest and best use of the property, in my opinion, based upon the present dominating market for that type of property, would be as a kuleana home site, possibility of using a portion of it for gardens, using the various buildings for dwelling purposes.

Q. Assuming that there were four wells on that property, one of them 175 feet deep, one 180 feet deep, one 76 feet deep, and another one 176 feet deep, those wells that previously had been used by the Honohulu Plantation Company in connection with their irrigation system of the surrounding lands, did you form an opinion in connection with the highest and best use as to whether or not those

(Testimony of John Francis Child, Jr.)

wells would add anything to the value of the land as such?

Mr. Vitousek: Now, if the Court please, we renew the objection. This is calling for the opinion of the witness on value, and he is not qualified, he has not been qualified as a witness capable of giving any value to these particular wells.

The Court: Well, from a real estate point of view can not he testify as to whether or not in his opinion the existence of these wells on this property do or not enhance the value of the property? [1959]

Mr. Vitousek: Well, that goes into value, if the Court please, and he is not qualified to testify as to the best use as to the character of these wells. And while there are other reasons that perhaps would amount in the examination—he is not qualified as an engineer.

The Court: Well, I think those factors may go to the weight of his testimony. I am going to overrule the objection and you may have an exception. Do you have the question?

The Witness: May I have that?

(The reporter read the last question.)

A. I considered that the wells would not add anything to the value or enhance the value of the land because the highest and best use of the land was for home site purposes and the water required to be used on the kuleanas would be very limited.

Q. Now, from the information that you had, did you form an opinion as to the fair market value

(Testimony of John Francis Child, Jr.)

of these two pieces of property, the land and the improvements on them, in October of 1944?

A. I did.

Q. Will you give us that opinion, please?

Mr. Vitousek: Now, if the Court please, that goes beyond the wells to property on the land that he did not see, a dwelling house, the other buildings. The witness said he got his information from hearsay. [1960]

Mr. Rathbun: It's perfectly proper, a perfectly proper way to get information. It goes to the credibility.

Mr. Vitousek: We object to the question as presented to the witness. It's shown that he cannot give an answer to the question based on hearsay.

Mr. Rathbun: I'm not going to waste much time on it, Judge. Mr. Austin didn't testify to any value of those sheds at all.

The Court: That's the only substantial thing that he didn't see is these sheds, as Mr. Rathbun points out.

Mr. Vitousek: I may have missed it, but I thought the dwelling was there.

Mr. Rathbun: The dwelling, yes.

The Court: I understood him to say that the dwelling was there but it was only the sheds that had been removed, is that right?

The Witness: The sheds had been removed.

Mr. Vitousek: Not the dwelling?

The Witness: Not the dwelling.

The Court: Well, I wondered at the time

(Testimony of John Francis Child, Jr.)

whether he meant that to apply to both, but I took it he meant just the sheds had been removed. I am going to overrule the objection and he may answer the question, and you may have an exception. Do you have the question?

The Witness: Yes, the opinion of value. [1961]

A. My opinion of the fair market value of the kuleana with the improvements thereon is thirty-five hundred dollars.

The Court: For both?

A. For F-1. And four hundred dollars for F-2.

Q. How much on F-1?

A. Thirty-five hundred.

Q. Well, you mean that's over-all?

A. That's the over-all value.

Q. And on F-2 four hundred dollars?

A. That's correct.

Q. Now, will you tell us your reasons for those valuations, the things that you took into consideration in arriving at that opinion?

A. In reaching the value of the land in F-1, I took into consideration the only near-by adjacent property that had been sold, the only sale, approximately 9.916 acres on September 16, 1944, document 75152, Oahu Beach and Country Homes, to J. B. Hilario, \$14,000, approximately \$1,347 an acre.

Q. And what price per acre did you use in arriving at the value?

A. In making adjustments for size and usability, I used a thousand dollars an acre.

Q. How far away was that sale that you just referred to?

(Testimony of John Francis Child, Jr.)

A. It's approximately 800 feet, it's directly across the stream from F-2 and some 800 feet from F-1. [1962]

Q. All right. Go ahead. Anything else that you took into consideration?

A. I considered that it was an isolated kuleana with only kuleana access, that it had a small size, uneconomic for farming purpose, but satisfactory for a home site, dwelling home site. In connection with F-2, the land is somewhat similar to the sale cited. I used a thousand dollars an acre for the portion of the land which was considered similar; that portion along the stream, I used \$250 an acre.

Q. So that on the land itself, on the breakdown you arrived at a higher figure than Mr. Ewart did? Did you consider his testimony in this case?

A. I did.

Q. He testified to \$976, I believe. All right. Seeing that you started on the breakdown, tell the Court how you arrived on the rest of it?

A. I didn't get the question.

Q. Tell the Court how you arrived at the rest of the valuation in making up your thirty-five hundred dollars on the one piece?

A. The pump house I gave a value, replacement cost, \$4,320, excluding any pump or other equipment; considered it 58 percent good, giving it a value of approximately \$1,800. The dwelling, I am informed it was built in 1926, 480 square feet, replacement cost, \$2,400. [1963]

Mr. Vitousek: If the Court please, I'd like, if

(Testimony of John Francis Child, Jr.)

possible, to get that value read back, on the pump house. I got eighteen hundred.

The Court: That's right. Just supposing you wait until he finishes this dwelling price. Then we can go back. On the dwelling you considered \$2,400 as replacement cost?

The Witness: That's correct.

The Court: Then what?

A. I depreciated it, considering it 32 percent good, a value of \$768.

Q. What did you base your depreciation upon?

A. The life of the building and observation.

Q. That's observed depreciation as well as theoretical? A. That's correct.

The Court: Now, Mr. Vitousek, you want the answer on the pump house read back?

Mr. Vitousek: Yes, where he started with replacement cost, the amount of it.

(The reporter read back the previous answer referred to.)

By Mr. Rathbun:

Q. All right. Proceed. What else?

A. The miscellaneous storage out buildings, I gave a nominal value of a hundred dollars from the description that I could get on it.

Q. Yes. [1964]

A. The wells I considered of nominal value, ten dollars, giving a total of \$3,446 which I rounded to \$3,500.

Q. Now, what about F-2, did you form an opinion of that?

(Testimony of John Francis Child, Jr.)

A. F-2 had no improvements on it and I gave it a value for .218 acres used for growing vegetables, a thousand dollars an acre, \$218; and .639 acres of idle land not as favorable along the stream, \$250 an acre, \$160; total of \$378 rounded to \$400.

Q. Now, on this same Civil suit, 529, Mr. Child, did you observe any irrigation ditches?

A. There were irrigation ditches running across the property above the land above the Kam highway.

Q. I show you Honolulu Plantation Exhibit No. 3 and call your attention to the upper lefthand corner where a black line has been drawn by Mr. Austin when he testified in this case, and within the circle of that black line is a red line. Is that about the location of the ditch that you saw on the property? (Showing exhibit in evidence to the witness)

A. I believe roughly that's the location.

Q. Did you make an appraisal report on 529 as to the fee ownership? A. I did.

Q. For the U. S. Navy? A. Yes.

Q. Will you tell us how you treated those ditches in [1965] valuation that you made of the fee land other than that owned by Honolulu Plantation Company?

Mr. Vitousek: If the Court please, we have the same objection that we made in regard to the wells. He has shown no qualification to give any evidence regarding value. And this apparently is a preliminary question for that purpose.

(Testimony of John Francis Child, Jr.)

Mr. Rathbun: Didn't you say, Mr. Child, that you did value plantation land, cane land?

The Witness: I have.

Mr. Rathbun: With irrigation on them, irrigation system?

The Witness: That's correct.

Mr. Rathbun: Previous to this, I mean.

The Witness: That's correct.

Mr. Vitousek: We still maintain he hasn't been shown to be an expert valuing irrigation ditches.

The Court: The objection is overruled. You may have an exception.

Q. Tell the Court in general the nature of that ditch, how it was built, constructed? Did you hear Mr. Austin's testimony? A. I did.

Q. Did you agree with him in the description of the ditch substantially? A. Yes.

Q. Now how did you treat that in your valuation of the [1966] fee of this land?

A. I considered that cane land, having been improved, being used for the growing of sugar cane, had a value which included the value of ground, improvements, any moveables, and considered that value to the owner, considering the leases, I considered that there might be certain rights against the owner, but I valued it as part of the fee.

Q. In other words, was it your conclusion that the value of the ditches went with the land itself, to be of no use to anyone else, is that right?

(Testimony of John Francis Child, Jr.)

Mr. Vitousek: If the Court please, to that we object as a leading question. I think if he said he considered them as a whole, as I understand the question now, he will give any other consideration to the owner as a whole, the land and improvements.

The Court: Well, the last question definitely is leading.

Mr. Rathbun: It is leading.

The Court: However, I think it was a summation of what the witness had just said, as I understood him, if I understood him correctly.

Mr. Vitousek: Well, if the Court please, with all due respect to the understanding, it wasn't my understanding and I think the witness should give his understanding without leading questions.

The Court: The objection is good, on the grounds of [1967] leading.

Q. Well, take the Court's suggestion and give your understanding.

A. The ditches and all contributing irrigation, moveable equipment, have no value in my estimation by themselves, but as a part of the land, and that the leases provide certain arrangements between lessor and lessee, but that in considering the real estate to them they are inseparable.

Q. Is that your opinion?

A. That is my opinion.

Mr. Rathbun: I think, your Honor, it might be well for us to clarify and bring out the situation in regard to this. Your Honor hasn't read these leases, I take it.

(Testimony of John Francis Child, Jr.)

The Court: No, I haven't.

Mr. Rathbun: We have very nice little question here that your Honor will have to decide. This is a good point to understand this particular feature of it.

The Court: All right.

Mr. Rathbun: You have two leases covering this 529 over which these ditches run. One of them is with the Oahu Railway and Land Company and by assignment to the Hawaiian Land and Improvement. The other is with the Bishop Estate. The Bishop Estate has a provision in regard to condemnation or sooner determination of the lease that the improvements which were put on after the date of the lease, or the effective date of the [1968] lease, shall be divided between the lessor and the lessee, as the lessee's interests may appear. Now, I suppose that means referring to the expired part of the lease and the unexpired part. Now, as to O. R. & L., the lease has substantially the same provision except that they have a right to withdraw 200 acres on giving six months' notice. What will happen to the ditch in case they should have withdrawn is something we will have to argue later. But this particular point is that that also has the same, substantially the same provision in the withdrawal clause and in the condemnation clause, that they will be divided, the improvements that were put in after the date or effective date of the lease, having in mind the status; that means, no doubt, the unexpired portion of the lease. In other words,

(Testimony of John Francis Child, Jr.)

if four years had gone by, which is the case here, on the 25-year lease, the landlord would be entitled to four twenty-fifths and the lessee would be entitled to the rest of it. Now, there is no use fooling around about it. That's the situation. Now, the construction of that clause—divided. If this lessee is entitled to improvements and that's the question your Honor will have to pass on, of course, there is no use of evading it. We should understand it and know what we are heading into in the line of what is to be decided. Technically we could take the position that that clause means that they can't recover from us. They will have to go after the landlord for it. I am not so sure of that myself when it [1968] uses the word "divided." I am not so sure that your Honor can't divide it or the Government can't do it, in tendering money for that separate payment for that kind of property. Now, I am calling your Honor's attention to that, to pose the question to you, and that is the question. I am not disputing that there are improvements here that at least going with the land might add something to the value of the land. We might as well be frank about it. But how it is going to be disposed of is something else. Now, I am interested in this, if your Honor please. I'd rather not have this put down because it develops some other owners.

The Court: All right.

(Discussion off the record.)

The Court: Now, on the record again.

(Testimony of John Francis Child, Jr.)

Mr. Vitousek: Now, if the Court please, counsel stated his position. Our position is quite a bit different. In the first place, the law of this Territory—that's what governs in this case—requires the land and improvements to be valued separately. And this is what was done in the witnesses' presentation here. If the witness testified, as this one did, that he considered the whole, he is not coming within, he is not complying with the law, because he gives your Honor nothing to base a division upon. Whether or not these owners have settled, have arrived at an agreement, a tentative agreement, has nothing to do with this case whatsoever. If they settle with someone else, they [1970] have no right to settle the rights of this defendant that's before the Court. The division, as authorities will hold and as the witness testified, is not on a basis of time. In other words, if the lease is for 25 years and five years have expired, you don't take the value of the improvements and divide four-fifth into one and one-fifth to the other. As their interests may appear means what would those improvements be worth at the end of the lease. And that's what the landlord would be entitled to; the difference is what the tenant would be entitled to. In order to get that right, you take the value at the time and the value at the end of the lease. You bring back that value to present worth and the difference is what the tenant gets.

Now, that roughly is our position in this matter. The Territorial statutes, which is a matter of pro-

(Testimony of John Francis Child, Jr.)

cedure which the Federal rules do not cover in condemnation cases, must be followed. In the first phase of the case is what we are dealing with now, as we divided it into two phases. It must show the value of the land and the value of the improvements separately.

Mr. Rathbun: There is no argument on that at all.

The Court: Well, the only point of pausing here was to understand the legal problem involved. I recognize that you differ on it. We can thrash it out later. The Court will eventually have to rule upon it.

Mr. Rathbun: Your Honor has a right, as a Court, to use [1971] the well-known tables that you can see fit when the time comes.

The Court: All right.

Mr. Rathbun: As I understand the law.

The Court: We have been operating an hour. We will take our usual recess at this time, and the reporter has been asked to report to Judge Metzger's court for a few moments.

(A short recess was taken at 10:20 a.m.)

After Recess

By Mr. Rathbun:

Q. Mr. Child, have you examined and are you familiar with the property involved in Civil 535 pending in this Court? A. I am.

Q. Are you familiar with the property owned by the Honolulu Plantation Company?

(Testimony of John Francis Child, Jr.)

A. I am.

Q. Involved in that suit? A. I am.

Q. Will you step down here a moment and point out on Exhibit B attached to the order amending the petition for condemnation, filed August 27, 1945—

A. The property of the Honolulu Plantation is up in here. (Indicating on a map)

Mr. Rathbun: I'm not familiar with the Court files as I am with mine. I can't find them.

The Court: What is it particularly that you are looking [1972] for?

Mr. Rathbun: Just to point out on the map that has the Honolulu Plantation piece on it.

Q. How many acres involved in this piece of property involved in Civil 535 owned by the Honolulu Plantation Company?

A. I converted it to square feet. Approximately 119,006 square feet.

Q. Look at your record and see if you can give the acreage, to identify it on the maps. I don't think there's any question about it. It's 2.732 acres? A. That's correct.

Q. When did you see that property first?

A. I have seen the property over a period of years and I inspected it with the purpose of estimating its value in several times in June 1945 and September 1945.

Q. You had seen the property before that, had you? A. I have.

Q. Familiar with it? A. Yes.

(Testimony of John Francis Child, Jr.)

Q. Will you describe the property?

A. The property is located on the outskirts of Aiea Village towards Honolulu, on the mauka side of the old Maunalua road. It has an irregular shape. The frontage on—

Q. We'll save a little time here. You sat in court while Mr. Moses testified, did you? [1973]

A. Yes.

Q. You heard Mr. Moses testify in regard to that property, did you? A. I did.

Q. And his description of it? A. Yes.

Q. Do you agree with it, that he substantially described it about the way it was in 1944, October?

A. According to my recollection, I believe he described it accurately.

Q. Have you formed an opinion as to the fair market value of that property on October 4, '44?

A. I have.

Q. And what is that opinion? A. \$14,100.

Q. Now, will you tell us what you considered in arriving at that opinion?

A. I considered that the property was for its highest and best use suitable for division into house lots, that a prospective purchaser probably would not use the entire property as a whole but would divide it up and sell the lots so subdivided. The property was—I considered suitable for that purpose, although because it was of its irregular shape the possibilities of subdividing the rear would not be as good as the front portion of the property. I considered sales of [1974] property near and

(Testimony of John Francis Child, Jr.)

around Aiea Village, more particularly the harbor view tract owned by the Coopers and I believe identified as the Cooper tract. Those lots were sold during the year 1941, interior lots, for 15 cents per square foot, being developed with roads and electric utilities, sewer and water. The lots along the Moanalua road, which probably are comparable with these lots, were sold—that is, comparable with the lots in this tract under consideration along Moanalua road—were sold at approximately 20 cents per square foot. Honolulu Plantation was purchaser. There were road frontage lots on the main highway, Kam highway, which were sold at 25 cents. Making adjustments for time and the situation of this, of the Honolulu Plantation property, I considered that an operator purchasing this property would subdivide it and probably sell it fronting on Moanalua road for a distance of a hundred feet at 25 cents per square foot; and that the rear portions of the property to be sold as lots approximately 15 cents a square foot. I also considered that any operator who bought this property for the purpose of selling it and subdividing it would deduct whatever costs there were and he would expect to get some profit for the operations, holding it until it was sold, and for his services in connection therewith, the value of the entire property at retail, based on the 25 and 15 cents per square foot would be \$20,000, \$20,150, or approximately 16.97 over-all. I considered that—

Q. You mean 16.9 cents per square foot?

(Testimony of John Francis Child, Jr.)

A. 16.9 cents per square foot over-all. I considered that the operator would have approximately five percent in expenses.

Q. What would those expenses be for?

A. Staking, deeds, and paper work.

Q. What about selling expense?

A. That he would probably sell the property and include the selling expense in his profit, which profit, based upon a study of the Cooper harbor view tract, was 28 percent. I used 25 percent. Deducting 5 percent for development expenses, 25 percent for an operator's profit of the gross sales price, it would be \$6,045 or a net value of the property of \$14,105 rounded to \$14,100.

Q. What about that 30 percent total that you have allowed for expense and profit, is that the usual—do you have any knowledge about whether or not that is usual in this community?

A. In nearly all real estate transactions where properties are purchased wholesale to be subdivided, the purchaser figures on making an operator's profit commensurate with the amount of difficulty involved in selling it.

Mr. Rathbun: You may cross-examine.

Cross-Examination

By Mr. Vitousek:

Q. Mr. Child, I notice you have been sitting in the [1976] courtroom practically throughout the trial of this case, is that right?

A. That's correct.

Q. Was that just in connection with your pos-

(Testimony of John Francis Child, Jr.)

sible testimony as real estate expert or as an advisor to the Government?

A. I conferred with counsel on a number of matters and I was sitting here in preparation for testifying on real estate matters.

Q. Well, most of the trial of this case didn't have to do with real estate values. Were you, then, advising the Government?

A. I sat here for the purpose of listening to the testimony to determine if any real estate matters would be brought up which I could advise or contribute on.

Q. Well, were you employed to be present here in the trial of this case? A. I was.

Q. So you were advisor to the Government for compensation? A. I was.

Q. In connection, Mr. Child, with F-1, the parcel that was referred to in your testimony as F-1--

The Court: Civil 529.

Q. That's correct. I want to get these figures right. As I understand in regard to the pump house you placed a value of \$1,800? [1977]

A. That's correct, as depreciated market value.

Q. The replacement cost of \$4,320?

A. That's correct.

Q. And 58 percent good? A. Yes.

Q. Wouldn't that give a greater value than \$1,800?

A. According to my computation it would be roughly that. I believe the exact figure would bring out to eighteen hundred—I mean 58.4.

(Testimony of John Francis Child, Jr.)

Q. If you multiply that again—I get about \$2,500. A. You are correct.

Q. Well, now, do you want to change your opinion in regard to the value of this particular pump house?

A. In view of the error I would use a rounded figure of \$2,500 as the value.

Q. Now, what is the nature of the interior construction of this pump house?

A. The interior was a—I might state that the exterior was corrugated iron, which was over a wood studding—that the interior was corrugated iron, that the base of heavy concrete estimated approximately six inches thick, with walls around, sunken floor, on which was mounted machinery. In considering this for dwelling purposes, I felt that a sub-floor would have to be put in to make it useful for that purpose. The condition of it was fair. [1978]

Q. A part of that has a construction, a sunken pit, has it not, in which the machinery was located?

A. It was.

Q. Did you put any value on that?

A. I considered that in arriving at the cost. However, I felt that for its highest and best use for dwelling purposes that a sub-floor would have to be put in, wooden probably.

Q. That would make a good basement, a good cellar?

A. It would. A very shallow one, however. It could be used for storage.

(Testimony of John Francis Child, Jr.)

Q. But you did consider it useable for dwelling house purposes, that basement or that sunken pit, or did you disregard it entirely?

A. I considered that it was a very good foundation for a dwelling, probably an over-improvement for such purposes, and that a sub-floor would have to be put in.

Q. Well, you considered it was the highest and best use, that its highest and best use was for a dwelling purpose? What was it being used for?

A. At the time I saw it it was being used for a pump house by the Navy.

Q. And as far as you know, that's what it had been used for prior to the Navy taking it over?

A. As far as I know, at some previous time it had been [1979] used by the Honolulu Plantation Company for a pump house, and just prior to the takings was not being used.

Q. Well, now, these takings under this particular suit not only involve this kuleana but a large area of land that had been under cane cultivation, do they not? A. That's correct.

Q. If the land had not been taken under the terms of this suit, all of it, what in your opinion would then have been the best use for this kuleana?

A. Well, I didn't consider it in that light. The property, or this kuleana with its wells was not being used previously, and I might possibly have considered it as over-improvement.

Q. Well, then, you considered its highest and best use was for dwelling house purposes because

(Testimony of John Francis Child, Jr.)

the surrounding land had been taken by the Government in this suit?

A. I considered it as an independent kuleana and therefore based more on that than anything else, that its highest and best use was dwelling house purposes. The surrounding land was not owned by the Honolulu Plantation Company, and that if taken as a unit, divorced in any way from the other lands, that its highest and best use would be for dwelling purpose.

Q. But if you would take it as a whole, the highest and best use would then be for dwelling house purposes?

A. Well, if you want me to assume that something different [1980] from the fact, that something is different from the fact, why I might have considered other higher and better uses. I don't know just what it would have been.

Q. Well, let's assume the facts. The surrounding land was all under lease to the Honolulu Plantation, being used for cane production, and this kuleana was as you saw it, with four wells on it and pump house, under those conditions. Assuming the conditions existing prior to the Government taking the land under this suit, what was the highest and best use?

Mr. Driver: Objected to. The reason for the objection is obviously that the measure of damages is not what this kuleana, what value it may have to the Honolulu Plantation Company.

Mr. Vitousek: If the Court please, that isn't the

(Testimony of John Francis Child, Jr.)

question that was asked. The highest and best use.

The Court: Of what?

Mr. Vitousek: Kuleana, of the kuleana; considering the conditions as they were in existence at the time, that prior to the bringing of this suit that surrounding land was used for cane production. That was part of one enterprise, the testimony has been in this case; it was under lease; this kuleana was part of that enterprise. We must take the conditions as they were.

The Court: But you are confining it, nevertheless, to the kuleana? [1981]

Mr. Vitousek: To the kuleana, yes, if the Court please.

The Court: I think the objection is not well-taken. It is overruled. And you may have an exception. Will you answer the question?

A. I would consider that the kuleana, in the light of the fact that the surrounding lands were now being irrigated by water from other sources, and the fact that it was not being used for a pump site just prior to its acquisition, that probably it had become an over-improvement and that it might be used more for dwelling purposes even to the plantation.

Q. Did you make any inquiry to find out if it was usable under those conditions as a stand-by source in case the other source failed?

A. I made no special investigation of that. However, I considered the fact that the pumps had been removed.

(Testimony of John Francis Child, Jr.)

Q. Now, Mr. Child, did you make any investigations as to possible use by the City and County of Honolulu for its rural water system of the wells on this kuleana? A. I did.

Q. Had the City and County considered using them?

A. My investigation showed that the City and County had made an inquiry concerning the availability of the property for sale.

Q. You stated that when you went out there the Navy [1982] had possession and installed pumps and was drawing water from the wells?

A. That's correct.

Q. Did you make any investigation to find out what it would have cost the Navy to dig and put in operation similar wells? A. I did not.

Q. Do you know where that water was being used by the Navy? A. No, I don't.

Q. In connection with your testimony concerning the value of the land mauka of the road on which the irrigation ditch was located, would that land have been as valuable without any irrigation system as it was with the irrigation system?

A. No, I considered that cane land without irrigation is not as valuable as cane land with.

Q. In connection with the McGrew Point or the kuleans on McGrew Point—

The Court: Cooper Point, same thing.

Q. —or Cooper Point—it's commonly called McGrew Point, isn't it? A. I believe so.

Mrs. Cooper was a McGrew? A. Yes.

No. 12023

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,
vs.
HONOLULU PLANTATION COMPANY,
Appellee.
and
HONOLULU PLANTATION COMPANY,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

(In Four Volumes)
VOLUME IV
(Pages 1249 to 1621)

FILED

DEC 31 1948

Appeal from the United States District Court
for the District of Hawaii

PAUL P. O'BRIEN,
CLERK

No. 12023

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Appeal from the United States District Court
for the District of Hawaii

(Testimony of John Francis Child, Jr.)

Q. I show you Exhibit 2-B. Will you identify that as [1983] tax map showing the two kuleanas involved? A. Yes.

Q. Now, in relation to this particular tract, where is the area you called the harbor view tract?

A. It's across the Kam Highway.

Q. It's almost directly across, is it not, from this land?

A. It was originally a portion of the same.

Q. Did you make any investigation of these two areas to find out what they did actually sell for when they were purchased by the Honolulu Plantation?

A. I got that figure. I don't recall it at the moment.

Q. Do you know the date they were purchased?

A. It was in the early nineteen hundreds. Don't remember just what the date was.

Q. Well, the land is more or less valuable now than it was in 1912?

A. You mean the land in general or these kuleanas values?

Q. Land in that vicinity.

A. Land in the general vicinity, to the best of my knowledge, is probably more valuable today.

Q. Now, isn't it a fact that the owners of the surrounding area are always very desirous of purchasing kuleanas within the areas?

A. That is true. [1984]

Q. And the highest and best use for these kuleanas would be a sale to the surrounding owner?

(Testimony of John Francis Child, Jr.)

A. I consider it so.

Q. Don't you consider, bearing in mind the condition prior to the Government taking in these lands involved in this suit, that the surrounding owner would have paid more than the figure you have placed as a value of these kuleanas for the kuleanas?

A. I didn't consider that he would pay more for the reason that he would have to desire them for particular use, which use I considered.

Q. If it was shown that the kuleanas were actually sold in 1912 for \$250, would that make any difference?

A. No. I wouldn't consider that as the basis for valuing them as of the date of this appraisal because it is, I think, common for plantation operators and other persons desiring kuleanas to operate in connection with other lands that they will pay nuisance value for them, which are highly speculative and rather difficult to determine.

Q. Don't you think the Coopers, who own this land, would have been willing to pay more than \$75 for L.C.A. 5669 at .107 acres right in the middle of their holding?

A. I think they would have considered what they were going to use the property for, and that from an economic standpoint they would first try to obtain it at that price. Any [1985] other premium they might pay would be highly speculative.

The Court: That's 2-B, Civil 521?

Q. Now, is that a very nice location for a house?

(Testimony of John Francis Child, Jr.)

A. It would be a very small house.

Q. Do you know the kuleanas have rights of way, don't you?

A. They have an indefinite right of way over adjacent property.

Q. And so anyone buying that would have a right of way, ingress and egress?

A. That is true.

Q. And in Hawaii, as a matter of fact, many people live on similar kuleanas, do they not?

A. Usually there are independent small kuleanas, certain home sites. However, I considered that this one was a little small for that purpose.

Q. But the use of kuleanas in Hawaii as home sites with a right of way is rather expensive, is it not?

A. That is true.

Q. And you would consider that in an open market this would bring no more than \$75 to it?

A. Because of its small size and inability for people in a general market, in my opinion, to use it; it is most valuable to the surrounding property and would be paid for on that basis. [1986]

Q. Now, with this surrounding property, if sold, would it be for more or less on a sub-division basis than the the property mauka of the highway which you said was part of the tract, would it sell for less or more?

A. It may have portions sold for prices exceeding or less, depending on the quality of the land, the method of subdivision and, of course, certain costs would have to be deducted.

(Testimony of John Francis Child, Jr.)

Q. Well, as a matter of fact, the McGrew Point, in absence of the Government handling it, considering it before condemnation, was very desirable property from the subdivision standpoint, was it not?

A. It was desirable property. I don't know whether I'd put the accent on that, the adjective "very."

Q. How about other areas that were available for sale around Pearl Harbor, were they not readily sold?

A. Property around Aiea and certain other places around Pearl Harbor were readily sold and desirable.

Q. Now, this other strip that you referred to, I believe it's 2-A or 2-B—

A. A.

Q. —that I referred to as the L.C.A.—

A. It's 2-A.

Q. —5669, cane area, .47 acres, does that front on the water? [1987]

A. That fronts on the—not the harbor frontage but there's a stream which runs down through here.

The Court: What? A stream?

The Witness: Stream.

Q. What was it used for prior to the Government taking?

A. A portion of it probably was used when Honolulu Plantation Company had a lease on other area of McGrew Point in connection with cultivation of cane. The lower portion of it was in reeds

(Testimony of John Francis Child, Jr.)

and I don't believe it had been used for many years.

Q. Did you make any investigation of the plantation, how much had been used for cane?

A. I did not. I did, however, estimate the area of dry land by taking a Navy surveyor.

The Court: You will have to speak louder.

A. By taking a Navy surveyor down there and having an estimate made of that area which was arable.

Q. Well, as a matter of fact, that area, most of it, could have been drained and used for cane, could it not?

A. At considerable cost, yes.

Q. Well, as a matter of fact, it had been drained and was used for cane prior to the taking, was it not?

A. I don't have any knowledge of portions of it being used for cane.

Q. And you made no investigation? [1988]

A. I did not.

Q. In connection with the area described, as shown, rather, on Exhibit 2-A, 2.732, or 37, acres of land, I show you Exhibit 2-A. Do you recall that?

A. This piece here, I do.

Q. That's what you placed a value of \$14,000 on, \$14,100?

A. That's correct.

Q. In arriving at that opinion I understood you to say that you took into consideration sales in the harbor view tract, is that correct?

A. That's correct.

Q. I show you Exhibit 8, and would you point

(Testimony of John Francis Child, Jr.)

out on that the location of the land shown on 2-A, Exhibit 2-A, that I also handed you?

A. Roughly, it is probably right in here. (Indicating on exhibit)

Q. You are pointing to an area of land shown under 535, are you not? A. Yes.

Q. The figure is 535. Where is the harbor view tract on this?

A. The harbor view tract is approximately here. (Indicating on exhibit)

Q. Now, were those the only sales that you took into [1989] consideration, those of the harbor view tract?

A. I considered those the most comparable sales to this property.

Q. Did you investigate any other sales?

A. I did.

Q. Where?

A. In Halawa Ridge and Aiea Heights.

Q. Are not some of those areas closer to this property?

A. Some of the area is perhaps a little bit closer but not as comparable, being view property on the heights.

Q. Is this view property?

A. It isn't, it is not.

Q. Now, as a matter of fact, this property fronts on a Government road, does it not?

A. That's correct.

Q. And if it was subdivided that road would be usable for the property as a means of access?

(Testimony of John Francis Child, Jr.)

A. I considered it so.

Q. What did you mean when you said this property was an irregular shape? It looks like a rather regular shape as shown on this map.

A. The property is not wide enough at the upper end. As you can see, it follows the railroad right of way and becomes narrower at the upper end. It is not wide enough to lend itself to the most economic type of lot. The lots would have to be [1990] long and narrow.

Q. Might they not be long and wide?

A. They could be. The prices and the highest values have been of regular shaped small lots. Used for comparison.

Q. How many sales of this harbor view tract did you consider?

A. The entire tract with the exception of five lots were sold out. I considered the record on all of those sales.

Q. As I understood, you said the Honolulu Plantation purchased some for 20 cents?

A. That's correct.

Q. Were those interior or lots on the main highway?

A. They were lots fronting on the old Moanalua road as opposed to Kam highway.

Q. Do you know what the lots on the main highway were sold at?

A. Original sales price was 25 cents per square foot.

(Testimony of John Francis Child, Jr.)

Q. Well, what sales did you consider? Did you consider any of 25 cents?

A. I considered that the subject property was more comparable to the property fronting on the old Moanalua road and gave greater weight to the values along that road.

Mr. Vitousek: That's all, if the Court please.

The Court: Redirect?

Mr. Rathbun: No, your Honor. [1991]

The Court: You are excused.

(Witness excused.)

The Court: Call your next witness.

Mr. Rathbun: We have no other witnesses, if your Honor please. And at this time I want to offer in evidence these letters which have been marked for identification, particularly the exhibits marked for identification from 2 to 15, both inclusive.

Mr. Vitousek: Well, if the Court please, I think they ought to be offered separately. We are going to offer objections to some and there will be different reasons for different objections. And unless the Court desires to take them up separately—

Mr. Rathbun: You can take them by order and object to them as they stand there. There they are. (Handing documents marked for identification to Mr. Vitousek)

The Court: Just a moment until I get my notes before me.

Mr. Rathbun: If your Honor please, I'll call your attention to it. November 29, 1940, is the

letter from Brewer to the Damon Estate, marked Exhibit 2 for identification. That's the letter which was attached to the proposed lease which was identified, and the proposed lease is No. 3. We offer those in evidence for reasons which are obvious.

The Court: What are your objections to those two?

Mr. Vitousek: Just a minute. I'll check this one, if [1992] the Court please. If the Court please, there is no objection to these.

The Court: Very well, they may become Government's Exhibits—

The Clerk: No. 2 is A, No. 3 is B.

(The documents previously marked as U. S. Exhibits 2 and 3 were received in evidence as U. S. Exhibits A and B.)

[Printer's Note: U. S. Exhibits A and B are set out in full at pages 1567-1568 of this printed Record.]

Mr. Rathbun: We offer Exhibit No. 4 for identification, being a letter dated May 5, 1941.

Mr. Vitousek: No objection, if the Court please.

The Court: Very well.

(The document previously marked as U. S. Exhibit No. 4 was received in evidence as U. S. Exhibit C.)

[Printer's Note: U. S. Exhibit C is set out in full at page 1578 of this printed Record.]

Mr. Rathbun: We offer Exhibit No. 5 for identification.

Mr. Vitousek: No objection, if the Court please.

The Court: It may be received.

(The document previously marked as U. S. Exhibit No. 5 was received in evidence as U. S. Exhibit D.)

[Printer's Note: U. S. Exhibit D is set out in full at page 1580 of this printed Record.]

Mr. Rathbun: I offer Exhibit 6 for identification.

Mr. Vitousek: If the Court please, we wish to object to the introduction in evidence of Exhibit 6 for identification because it is incompetent, irrelevant and immaterial, it already having been shown there was an exchange of letters forming a part of what I believe is Exhibit 9-K which constituted [1993] the agreement for a lease of the areas in question, so-called Damon Estate land. And that having been determined by the parties, having an offer and a complete acceptance, that it could not be varied by the trustees sending any subsequent letter asking for changes. It is immaterial.

The Court: You have introduced Exhibit 18—

Mr. Vitousek: The answer to this letter.

The Court: —the answer to this letter.

Mr. Vitousek: As I called to the Court's attention, we didn't know how to proceed because in those conditions they offered them for identification without offering them in evidence. We closed our case. We had to have some answer to these letters.

The Court: Well, if the answer is in, I had better have the original letter. So I am going to overrule your objection, and Exhibit 6 for identification may be received as an exhibit.

The Clerk: Exhibit E.

(The document previously marked as U. S. Exhibit No. 6 for identification was received in evidence as U. S. Exhibit E.)

[Printer's Note: U. S. Exhibit E is set out in full at page 1581 of this printed Record.]

Mr. Vitousek: May we have an exception?

The Court: You may have an exception. Next is Exhibit 7?

Mr. Rathbun: Exhibit No. 7.

The Court: December 16, 1941, letter by the company to the Damon Estate. [1994]

Mr. Rathbun: Yes.

Mr. Vitousek: If the Court please, this particular communication has nothing to do with anything in the matter in issue in this case. It's simply a statement that the land—that there would be cooperation in planting and growing of food crops. I think at that time the war was on.

Mr. Rathbun: It shows the unsettled state of a situation in an unclaimed lease, which we claim, of course, they did not have.

Mr. Vitousek: If the Court please, if you had a lease you had to change the uses of, you would have written it anyway. This was a war condition and writing in form might be needed for growing food stuffs.

The Court: Well, whether it does or does not bear on the issue can be determined in relation to the study to be made of the lease. I am going to admit it and you may have an exception.

Mr. Rathbun: That's true of all of these let-

ters. They are offered for the purpose of showing the unsettled condition of a lease that they claimed they had positively in force and effect.

The Court: U. S. 7 for identification may become—

The Clerk: U. S. Exhibit F.

(The document previously marked as U. S. Exhibit No. 7 for identification was received in evidence as U. S. Exhibit F.) [1995]

[Printer's Note: U. S. Exhibit F is set out in full at page 1584 of this printed Record.]

The Court: Exception granted.

Mr. Rathbun: I offer in evidence Exhibit No. 8 for identification.

Mr. Vitousek: Now, if the Court please,—

The Court: Is that the famous Merriam letter?

Mr. Vitousek: —this and 9 are the so-called Merriam letters, if the Court please. The receipt of these letters in evidence is objected to. There is no showing that Mr. Merriam had any authority in the premises, particularly showing as to the contrary from Mr. Spalding's testimony, from the showing of the powers of attorney, that the best it could be taken as is nothing more than a possible expression of Mr. Merriam's. It's certainly not binding on the company and he could not vary the wording or the agreement that we claim was consummated by the exchange of the first two letters. In addition to that, it was clearly shown as to the condition of his health.

The Court: I am going to overrule your objec-

tion to both and both may be received and you may have an exception on each one.

(The documents previously marked U. S. Exhibits 8 and 9 for identification were received in evidence as U. S. Exhibits G and H respectively.)

[Printer's Note: U. S. Exhibits G and H are set out in full at pages 1586-1588 of this printed Record.]

Mr. Rathbun: The next one is Exhibit No. 10 for identification, being the letter of January 3, 1943, written by [1996] Mr. Spalding to Vice Admiral Ghormley.

Mr. Vitousek: If the Court please, we object to the receipt in evidence of this document as incompetent, irrelevant and immaterial. It has nothing to do with the issues involved in this case.

Mr. Rathbun: The special purpose of this letter, if your Honor please, is the discussion by Mr. Spalding, the President of C. Brewer and Company, the agent for Honolulu Plantation, and its attorney-in-fact, in regard to the nature of his claim, that is, the claim of the Honolulu Plantation Company, showing that it is based upon a loss of profits. It goes to the credibility.

Mr. Vitousek: If the Court please, that is not shown because it shows in the wording of the letter "damage to the enterprise and the business."

Mr. Rathbun: But he defines what it is in that letter.

The Court: It may be received. You may have an exception.

The Clerk: I.

(The document previously marked U. S. Exhibit No. 10 for identification was received in evidence as U. S. Exhibit I.)

[Printer's Note: U. S. Exhibit I is set out in full at page 1590 of this printed Record.]

Mr. Rathbun: I offer in evidence Exhibit No. 11.

The Court: The reply?

Mr. Rathbun: The reply, for the reason that it is a reply.

Mr. Vitousek: If the Court please, the same objection. [1997]

The Court: Same ruling, same exception. It may become—

The Clerk: J.

(The document previously marked U. S. Exhibit No. 11 for identification was received in evidence as U. S. Exhibit J.)

[Printer's Note: U. S. Exhibit J is set out in full at page 1603 of this printed Record.]

Mr. Rathbun: The next series, beginning with 12, pertain to the contract of sale. I offer 12 in evidence.

Mr. Vitousek: We have no objection.

The Court: Very well.

Mr. Rathbun: And you have no objection to 13, 14 and 15?

Mr. Vitousek: No.

Mr. Rathbun: Is that right?

Mr. Vitousek: Right.

The Court: They may be received. U. S. 12 for identification becomes—

The Clerk: K.

(The document previously marked U. S. Exhibit No. 12 for identification was received in evidence as U. S. Exhibit K.)

[Printer's Note: U. S. Exhibit K is set out in full at page 1605 of this printed Record.]

The Court: U. S. 13.

The Clerk: L.

(The document previously marked U. S. Exhibit No. 13 for identification was received in evidence as U. S. Exhibit L.)

[Printer's Note: U. S. Exhibit L is set out in full at page 1608 of this printed Record.]

The Court: U. S. 14. [1998]

The Clerk: M.

(The document previously marked U. S. Exhibit No. 14 for identification was received in evidence as U. S. Exhibit M.)

[Printer's Note: U. S. Exhibit M is set out in full at page 1609 of this printed Record.]

The Court: Fifteen. Fifteen consists of two documents, one a letter, and the other a resolution attached to the letter.

The Clerk: You want to mark them N-1 and N-2?

The Court: I think perhaps that is advisable so that it doesn't get lost.

The Clerk: The letter is N-1 and the resolution is N-2.

(The documents previously marked as U. S. Exhibits 15 for identification were received in evidence as U. S. Exhibits N-1 and N-2.)

[Printer's Note: U. S. Exhibits N-1 and N-2 are set out in full at pages 1610-1613 of this printed Record.]

The Court: Very well.

Mr. Rathbun: Now, I think that's all. But for protection purposes I offer any other document that we have had identified except the claim to Congress, which has not yet been introduced in evidence. I think that's all.

Mr. Vitousek: I certainly must object to such a blanket offer, if there is anything else here.

Mr. Rathbun: I am only holding it open so I can check. That's all.

Mr. Vitousek: I have no objection to it being left open, if the Court please, but I think whatever is being offered should be particularly called to the Court's attention. And [1999] I have no objection to holding it open until some future time.

The Court: There is no other one except Exhibit 1 for identification?

Mr. Rathbun: Now that will remain open until we hear. With that reservation we are closed.

The Court: Very well. So the only two things remaining, to repeat, are to clear up U. S. 1 for identification and as to when it is cleared up you have Mr. Spalding back for further cross.

Mr. Rathbun: May or may not.

The Court: May or may not. In event, he is due back to give you an answer about this pension business. Since this Congressional claim was sent from Washington, you say Saturday by air mail, I should expect that it should be here today.

Mr. Vitousek: It ought to be here. Mail is frequently uncertain, but it ought to be here either today or very shortly.

The Court: Well, supposing we meet tomorrow morning at nine o'clock on the assumption that it will be here, and we can clear up the remaining few details. You will certainly know by this afternoon whether it is here or not, will you not?

Mr. Vitousek: May I ask Mr. Kay regarding this pension? I don't know whether that will be cleared up tomorrow or not. Mr. Kay thinks that the pension matter will take more than one day.

The Court: Well, on that particular thing, listening to questions and answers, I am inclined to think that Mr. Spalding may be inclined to give Mr. Rathbun more than he asked for. And limiting it to exactly what he asked for—

Mr. Rathbun: I'm not too much interested in it if it's going to require a lot of delay and research.

Mr. Vitousek: As I understood it, if the Court please, the request was a list of the employees and

the amounts to be paid as employees, to receive the pensions, and the amounts they were to be paid.

Mr. Rathbun: The amount what is to be taken, actually taken out of this 400,000 was what we asked for.

The Court: That's right. And the witness said he'd go one step further and show it as actually paid.

Mr. Rathbun: Some of it.

The Court: Some of it. Well, say what is today? Judge Metzger has a matter on Friday. Do you think we can make headway if we pass the day and set the 16th for the clean-up day?

Mr. Vitousek: Well, if I may suggest, we can hold tomorrow open. If they come, we can get it cleaned up. But I wouldn't want to say it will be here certain, if the Court desires to hold the morning open and if they do come—

The Court: Well, I'll be here and I have nothing on except this matter for tomorrow morning.

Mr. Vitousek: I can notify Mr. Rathbun if they are here, and we can go ahead.

The Court: All right, let's schedule it as expected for tomorrow morning at nine. However, between 8 and 9 in the morning, if there is some reason why we will not make advantageous progress, if you will notify me we can adjust the matter.

Mr. Vitousek: Anticipating perhaps a little—I don't know how the Court is going to handle this, whether with argument or briefs. But if argument, I wouldn't want to start in tomorrow if we

are cleaning it up. I'd rather have a day or so to clean this all up.

The Court: Well, on that particular point, I think I'd rather have briefs on this particular case. It is so complicated anyway. Frequently argument goes in one ear and out the other, and you don't remember and it's going to be months, I'm afraid, before the case is digested fully enough to render a decision. So I think written briefs would be more helpful. What is your reaction to that, Mr. Rathbun?

Mr. Rathbun: Well, with the understanding that it will be done within a period of, say, six weeks, that will be satisfactory to me. Otherwise, I'd like to, if we can't do it in that time, to argue it orally. I have a reason for that. I am severing my connection with the Government at the end of this case. I want to be back by March 1st at least.

Mr. Vitousek: As far as we are concerned, I certainly [2002] wouldn't want the briefs to extend over six weeks myself.

Mr. Rathbun: I'd rather not have in the record what I said about resigning.

The Court: All right. Strike that out. If I require briefs of you gentlemen, you are going to first require the transcript, no doubt.

Mr. Vitousek: Well, it would be better, but I am finding it difficult. Did you order a transcript?

Mr. Rathbun: We are still waiting.

The Court: I appreciate your position, Mr. Rathbun and I will do everything to cooperate

with you, and yet I have a feeling that briefs will be more helpful than oral argument. I am just wondering if, when the transcript is available, especially since Mr. Driver has sat with you through the case, whether or not he and other attorneys in the department might not be able to file the brief.

Mr. Rathbun: I don't know. Mr. Driver will have to speak for himself about that.

The Court: I'd be reluctant to hold you just for that matter of a brief.

Mr. Rathbun: I think this record could be gotten out if he sits on it and works on it.

The Court: I know but the reporter is only human and he has another transcript or two. Well, let's all of us think about that matter, and my reaction, my preference is for briefs. [2003] You want to make outlines of what your briefs will contain, and I will listen to you but I would like not voluminous briefs either but concise to the point briefs.

Mr. Vitousek: If there would be argument, I would prefer to argue after the briefs are in and it would freshen my mind, and not argue now and then file some briefs at some distant future period.

The Court: Well, I don't think there is any definite position any of us can take on it at this moment. Let's sleep on it a little while and see how it looks tomorrow, and possibly wind up this case. Until nine o'clock tomorrow, unless before tomorrow at nine I hear from you to the contrary

that it should be a later date, the case is adjourned.

(The Court adjourned at 11:30 a.m.) [2004]

Honolulu, T. H., January 15, 1947

The Clerk: Civil No. 514, United States of America versus 257.654 acres of land, more or less, and others; case called for further trial.

The Court: The parties being ready, I believe the only things remaining are the possible rebuttal evidence, which we haven't considered, the pension plan and the Congressional reference claim. Have you those things at hand?

Mr. Vitousek: I am ready to proceed. if the Court please.

The Court: Very well.

Mr. Vitousek: If the Court please, a request was made of Mr. Spalding for the pension, the list of the proposed pensions, and I have it with me and it has been submitted to the Government attorneys, a proposed payment of pensions, which does not include the month of January.

The Court: This year?

Mr. Vitousek: This year. The payments for January being due and payable on the 15th day of January, which is today. And I am informed it would amount to approximately \$3,000. This payment is recommended by the manager and must go to the directors in San Francisco for approval. It shows a total on the sheet for a period commencing after the current payments of \$397,701.10. I

am informed by the attorneys for the Government that they will not require this to go into evidence. It's [2005] quite a lengthy document and has a lot of names and will fill up the record unnecessarily.

The Court: Very well.

Mr. Rathbun: We have seen it.

The Court: All right.

Mr. Vitousek: Now, if the Court please, in regard to the other matter which was left open, the Court made an order that we produce what was termed a claim before Congress. Now, I wish to state that I personally was not in that case and knew nothing about the proceedings other than what I have been informed, as it is shown in the record here and as I was informed. Mr. John J. Courtney, an attorney in Washington, D. C., handled this matter as an attorney for the Honolulu Plantation Company. After the Court made its order, I endeavored to get Mr. Courtney by telephone, was unable to do so, so I sent him a wire Friday asking him to talk to me over the telephone and to send here the report or claim or whatever it was as filed. I received yesterday afternoon by air mail, special delivery, a document with an accompanying letter. In view of the fact that I have had nothing to do with this matter, and getting my information from Mr. Courtney, I'd like to read the letter. It is self-explanatory. It is addressed to myself, dated January 11, 1947, and reads as follows:

“Dear Roy:

“In response to your cable received this morning, I am [2006] transmitting herewith an exact and complete copy of the brochure filed by Honolulu Plantation Company at the time of the introduction of H.R. 2688 in the 79th Congress. An identical copy was furnished to each of the Government agencies at the same time, to wit, Justice, Army, Navy, Interior, Federal Works Agency and the Budget Bureau. There were no changes made in it, and it is the same instrument which was filed with the House Committee on Claims of the 79th Congress and mentioned in House Report 1313 recommending passage of the Bill as amended, and making specific findings of fact in connection with the representations of the Government departments as furnished to the Committee. I trust that these reach you promptly. By these I mean I am depositing a total of four copies in different mails today to insure delivery. I shall stand by for your call.

With Kindest personal regards,

Sincerely yours

JOHN J. COURTNEY.”

I was able to talk to Mr. Courtney by trans-Pacific telephone on Monday of this week and at that time he informed me he had mailed these documents and that no changes had been made. Upon examining the report he mentions, apparently the document was introduced before the hearings referred to as Exhibit 1.

Now, I make that statement because whether it is a claim [2007] or a brochure, apparently it is the document filed. The other day I borrowed the document which is marked Exhibit 1 for identification, compared it with a document I had which came to me from the plantation office, and found it identical. I have compared the document with which I compared Exhibit 1 with the one as sent by Mr. Courtney and found it identical. So I think I can make this statement that the document Mr. Courtney sent me is identical with Exhibit 1 for identification. That is, I didn't compare it with that document but by comparing it as we did, I think it is safe to say they are identical.

The Court: Mr. Rathbun, now that this copy, represented as accurate of what was filed by this company with the last Congress, is here, have you had an opportunity to compare it with Exhibit 1 for identification?

Mr. Rathbun: I haven't, but they have.

The Court: Do you want such an opportunity?

Mr. Rathbun: Well, I have offered the document that is marked Government Exhibit 1. They now say that that is the document that was filed, according to Mr. Courtney. There is nothing further for us to do.

Mr. Vitousek: If the Court please, if it is being offered, I want to interpose an objection to its being offered, for the record.

The Court: Well, before we get there, let's make sure we are straightened out. The situation is that when all is [2008] said and done, the company is

admitting that Exhibit 1 for identification is an accurate copy of what was filed with the last Congress in relation to this company's claim to Congress?

Mr. Vitousek: That is correct. What they called Exhibit 1 was introduced for the Committee.

The Court: All right. Now, I think that straightens out the confusion that existed insofar as that document is concerned. Now, where does that get us?

Mr. Rathbun: I offer the document marked Government Exhibit 1 for identification in evidence in this case, if your Honor please.

Mr. Vitousek: Now, if the Court please—

Mr. Rathbun: On the grounds that it goes to the credibility of the witnesses in this case, and also it constitutes, when read as a whole, an admission against interest insofar as the interest they are making in this Court is concerned, of the claim.

Mr. Vitousek: We object to the introduction of the document upon the grounds that it is incompetent, irrelevant and immaterial and does not do what counsel states, and in any event is inadmissible in a claim in the action before this Court, in the proceedings before this Court. This document, as has been called to the attention of the Court, consists of what would probably be termed a petition for relief, actually a letter of transmittal, a statement by Mr. Jacob— [2009]

Mr. Rathbun: Jacobson.

Mr. Vitousek: Just a minute. By C. H. Jacob-

son, who was at that time the President of the Honolulu Plantation Company; a statement of the qualifications of Mr. Schmutz and of Mr. Austin, although it nowhere appears that Mr. Austin has anything further other than his qualifications; then appears a statement by Mr. Schmutz, a letter and what is probably termed his remarks; and the nature of the damage and the damage estimates; then, if the Court please, there is a series of computations made up, as stated on the stand by Mr. Schmutz, made up in San Francisco but would probably be termed, are termed schedules, computation of figures; then there is a statement here by the attorney for the company, the attorney in presenting the claim—it appears to be an unsigned statement, as to the legal status of the matter, and that, of course, is what we are before this Court to determine; then there is a statement by the manager of the company in general terms, followed by the names of the stockholders, together with the shares held by the stockholders; a copy of the Bill as presented to Congress, not as it passed the House of Representatives.

Now, none of these matters would constitute an admission against interest or in any way contradict the testimony of the witnesses before the Court. And the opinion of the attorney does not in any way bind the company because it has not been concurred in by the representatives of the Government, and that's the reason we are before the Court. If they come before Congress and agree to it, as they did not, that would be one thing. And now in this par-

ticular action, this particular attorney is not an attorney representing the parties, but the firm of Stanley, Vitousek, Pratt and Winn are. And we present the views to this Court of our understanding of the law and our position in regard to the law, which we have done in the various objections to evidence, various motions, and will do so in the briefs that will be presented according to your Honor's desires.

And for all those reasons we object to the introduction of this exhibit in evidence.

The Court: You believe on the theory of the document containing certain admissions against interest that the entire document is admissible, Mr. Rathbun?

Mr. Rathbun: Yes, your Honor. It's all one document. It has exhibits attached to the back end of it which are referred to by Schmutz. The arguments presented by those, the exhibits, are illustrative of the arguments presented by the different parties who make these different statements in the claim. They all go to one purpose, that is, to state their claim to Congress; it's all one document and must be read together.

The Court: How about this opinion by the attorney?

Mr. Rathbun: It's all part of the document as filed. [2011] I don't know that it is signed by any attorney. I don't know that it is a statement of an attorney even. I don't know where Mr. Vitousek gets that.

Mr. Driver: A statement by the parties in interest.

Mr. Rathbun: By the parties in interest. There isn't any attorney that I know of.

The Court: It's headed by a statement by a party in interest.

Mr. Driver: A statement that their counsel have advised, and so forth.

Mr. Vitousek: If the Court please, a statement that they are advised by counsel regarding the law. Now, that's the very matter before this Court. Suppose they had been incorrectly advised? It's certainly not frequently that parties are advised as to the law, and the Court changes that law by its decision. And it has no effect. If in here they could show a difference between the witnesses' testimony and the computations, which are unexplained, it might be said then that it would be contradictory. But there has been no such thing.

The Court: Wasn't there something of that sort in regard to Schmutz' testimony?

Mr. Vitousek: No, if the Court please, Mr. Schmutz said he thought certain of the exhibits had been changed, the only point of difference that might be. But that's a mere matter of [2012] argument. He didn't contradict the figures. But on the availability of money to pay dividends, now, under the California law you can pay dividends out of the current earnings, and in one of these exhibits it shows the net receipts from which had been taken depreciation, and so forth. And he said that the amounts which are in the books, in the book entry

setting aside, or taking out the depreciation and amortization, while that's shown here, he said in his opinion those are still available to pay dividends. And they are under the California law, as we showed your Honor. But there's nothing to show that we are wrong. That's the point. It's just a matter of interpreting the figures as shown. The same thing came up, your Honor will recall, when we offered the plantation reports in evidence, the statements of the parties; the figures as shown from the books were received but the statements of the manager and president were excluded. And that's our position, we submit, your Honor.

The Court: Have you anything else you want to say?

Mr. Rathbun: Why no, your Honor. We are not disputing the figures. Those are their figures. We took the figures as we found them in cross-examining these witnesses. Mr. Vitousek misses the point of the purpose of the cross-examination in hooking this up, it seems to me. We asked on cross-examination of all of these witnesses that testified to value what they based them on as opinion of a million dollars decrease. [2013] And among other things the experts specially named several things that they considered. What we have in mind is the law on the things that they did consider as being items of damage which cannot be used in a condemnation suit in arriving at what the value is. Among the things were earnings. Now, like all experts, Mr. Schmutz specially, after going over those different things that he considered but didn't consider, what-

ever that means, I can't help in this final case that I am trying in these courts to make the comment that if there is anything in jurisprudence that shakes the confidence of the public in jurisprudence it is experts so-called. This is a fine illustration: he named five or six different things that he considered, and then when pinned down on cross-examination he said he gave no value to that in arriving at his opinion. Therefore, he pulled it out of air. That's what we'll argue. Just as Mr. Cozier did. He talks about earnings, all of those things, and then he says that he gave no dollars and cents value to all of those things. This shows that he did, this claim in Congress, based solely on that. Therefore, we argue that it is a business assistance. It is inconsistent with his testimony.

The Court: In view of the fact that this claim to Congress is substantially the same type in general of what is made here, and in view of all the cross-examination of the experts with reference to this Congressional claim, I am going [2014] to admit Exhibit 1 for identification, and you may have an exception to it.

Mr. Vitousek: Exception, if the Court please. Now, if the Court please, I have one matter——

The Court: Just let it get marked. Exhibit 1 for identification becomes——

The Clerk: U. S. Exhibit O.

(The document previously marked U. S. Exhibit 1 for identification was received in evidence as U. S. Exhibit O.)

Mr. Vitousek: If the Court will recall, I reserved the right to adduce evidence in case this was admitted, and if counsel is through, I have one matter I want to bring up.

The Court: This is in the nature of rebuttal?

Mr. Vitousek: Yes, to this exhibit.

The Court: Before we get there, have you finally made up your mind as to what you are going to do about your request to recall Mr. Austin?

Mr. Vitousek: I am going to waive that.

The Court: Everything is cleaned up up to this point, and the only thing is rebuttal from now on? All right, you may call your first witness in rebuttal.

Mr. Vitousek: It will not be witnesses. I want to offer in evidence the report of the Congressional Committee of the House of Representatives, which Committee was considering the [2015] claim and considering this brochure, a report numbered 1313, which I referred to. And in view of the fact that in making the offer of this exhibit—Government attorneys said that it is an admission against interest because it constitutes a business damage—this report shows how it was considered and received by the Congressional Committee to whom it was submitted. Attached to this report are the letters from the Attorney General, from the Secretary of the Navy and from the Acting Secretary of War. We offer this report in evidence.

Mr. Rathbun: I object to it as incompetent, irrelevant and immaterial what some House Committee might find about this claim, if it has any

justification in this record. Our purpose in putting this document in goes to the witnesses that testified, that were cross-examined. Nobody can cross-examine those men who signed their names to that. I don't even know who they are. I have never seen them.

The Court: On what theory do you offer this?

Mr. Vitousek: Well, if the Court please, this is an official document. Under the case of *U. S. against Aluminum Company of America*, reported in 1 Federal Rules Decisions, on page 71, it is admissible without further proof because it has been officially printed, because it is printed on the face itself.

Mr. Rathbun: We raise no question as that, that it is official. [2016]

Mr. Vitousek: It may be either received in evidence or be judicially considered by the Court.

The Court: Do you have in mind on that last point judicial notice? Do you have judicial notice in mind?

Mr. Vitousek: Yes, it was held in this case that either it could be received—we feel that it should be part of the record rather than by referring to the outside. The claim was submitted to Congress and contains in it an opinion of counsel, a statement that they had been advised by counsel. Now, in this report is also shown the position of the various Government agencies, one of which being from the Secretary of the Navy in which it is claimed that the opinion of counsel was wrong, that the Baetjer case controlled, and that it was a matter that could

be determined before the court. Now, it all ties up to this report, if this report is going to be used for the purpose which is stated by counsel as an admission against interest. We feel that the entire Congressional hearing and report is a part of that complete record. The bill as submitted in the record was changed there; the payment of a claim was changed to an authority to present before the Court of Claims; and it is all shown in the report. We feel if this report is in evidence, then the entire matter should be before the Court.

The Court: Let me see that.

Mr. Rathbun: In the light of that, the case that counsel [2017] cited, there is nothing in that case that says that any document should be received that is not material to a law suit, which is incompetent and immaterial on the mere point that is cited there, that the document upon its face—the apparent authenticity of the Government department is well-known and I have no objection to that, but it must be shown to be material. If we are going to take the opinions of a lot of lieutenants, and so forth, in the Navy, we might as well start subpoenaing about a thousand witnesses on mere opinion.

The Court: This is the only report that was ever made by that Congress on this claim?

Mr. Vitousek: Yes, if the Court please. This is a report by the House Committee. It is the only one made.

The Court: It never got to the Senate?

Mr. Vitousek: It went to the Senate but Con-

gress adjourned before the matter was brought up before the Senate. And I call the Court's attention to the fact that this brochure, whether you call it a claim or not, was the one referred to in there as Exhibit 1. In there, I mean by the report of the Committee.

The Court: I am going to admit it so I can have the whole picture before me to find out what it is all about. It may become exhibit what, Mr. Clerk?

The Clerk: Honolulu Plantation Exhibit No. 19.

The Court: The Government may have an exception. [2018]

(The document referred to was received in evidence as Honolulu Plantation Company's Exhibit No. 19.)

[Printer's Note: Exhibit No. 19 is set out in full at page 1542 of this printed Record.]

Mr. Vitousek: I close the matter, if the Court please, insofar as the Honolulu Plantation Company, respondent.

The Court: All right, then both parties rest?

Mr. Vitousek: We rest.

Mr. Rathbun: That's right.

The Court: Very well. I indicated yesterday that at the termination of the case I will prefer to have briefs rather than oral arguments exclusively. I still feel the same way about that, in view of the complicated nature of this case. On the subject of getting out the transcript, which I understand both parties have ordered or made arrangements with the reporter to procure, the reporter tells me that he has employed a dictaphone operator and the

prospects of getting it out sooner than otherwise indicated are enhanced. What is your present prognostication of when the transcript will be ready?

The Reporter: About two or three weeks.

The Court: That would be about February 10th, without holding you to any such date but as a working proposition. Knowing that I want briefs, do you also want to orally argue the case?

Mr. Rathbun: I don't think there is any occasion for both.

Mr. Vitousek: I think there is no occasion for it unless [2019] the Court feels that after the briefs are in you might want it.

The Court: I'd be well satisfied to have the briefs exclusively unless there is some point raised in the briefs that I'd like elaboration upon.

Mr. Rathbun: I might state to the Court that as far as the Government is concerned we are prepared from our notes to file a brief in this case on very short time without the record, if the Court wants it.

The Court: Very well.

Mr. Vitousek: Well, if the Court please, I think since we are going to file briefs we should have the record. While we think our notes are accurate, I don't like to be in a position of making a statement and not having it from the exact record. I don't think, I don't believe that it would take quite as long, of course, as what it would ordinarily if we get the record. But I'd like to be able to quote the exact record.

The Court: Well, you having the burden in this

case, it will be your duty also to file the first brief. How many days after the record is available to you do you want for the filing of the opening brief?

Mr. Vitousek: I would suggest two weeks, if the Court please, for the brief.

The Court: And after that is filed, how long does the Government want to file its reply? [2020]

Mr. Rathbun: That's a little hard to tell until we see their brief. We'll base it on their brief.

The Court: What arrangement can we make now that would be satisfactory?

Mr. Rathbun: I'm sure I couldn't guess about that. They might file one of ten pages or one of five hundred.

Mr. Vitousek: We intend to cover the matter thoroughly and naturally we can't say how many pages, if the Court please. I feel that this is an important matter and we should not try to cut down.

The Court: Are you sure that two weeks after receiving the transcript is long enough?

Mr. Vitousek: I think so. We can work on it in the meantime, on the law, etc.; I say that because naturally we wouldn't have to study the transcript for that.

The Court: I was thinking of giving the Government 30 days after you file your brief.

Mr. Vitousek: Well, I can assure the Court that whatever time we have we will file a brief as soon as we have completed it. We are not going to delay. If the Court thinks 30 days, I should think we

should have more time, but naturally we want to get it in.

Mr. Rathbun: Well, the situation as far as I am concerned is what I stated yesterday.

The Court: Well, I think to be equally fair about the [2021] matter, I am going to give you 30 days within which to file your opening brief from the date the reporter files the transcript, and after your brief is filed and served on the Government, it may have 30 days within which to file a reply brief. And after you receive its reply brief, you may have two weeks within which to file an answering brief.

Mr. Vitousek: Yes.

The Court: All right. The case stands submitted, and I know it's been a hard case, but I do want you both to know that I appreciate your attention and courtesy and help. And I don't know whether Mr. Rathbun would want this on the record or not, but I do know that he has said that this is the last case he is going to try here for the Justice Department, and I do want him to know he is leaving with the good wishes of all concerned, and we have appreciated his aid and assistance in all condemnation work in this Court.

Mr. Rathbun: I am very grateful, your Honor. I have been treated very well by the Court here and I have appreciated all they have done for me.

Mr. Vitousek: If the Court please, I'd like to say that we appreciate the courtesy that has been extended by the Court and by the Government attorneys from time to time, when we had to adjourn

to get more time, and extreme courtesy has been shown.

The Court: Very well. Now that all flowers have been [2022] distributed, we will adjourn.

(The Court adjourned at 11:40 o'clock a.m.)

I, Albert Grain, Official Court Reporter, U. S. District Court, Honolulu, T. H., do hereby certify as follows:

That the foregoing is a true and correct transcript of testimony in the trial of Civil No. 514, United States of America versus 257.654 acres of land, and Civil Nos. 521, 525, 527, 529, 532, 533, 535, 536, 540, 544, 548 and 684, consolidated into one trial held in the above-named court on December 2, 1946, 3, 5, 6, 9, 10, 11, 12, 19, 20, and January 6, 8, 9, 10, 14 and 15, 1947; that same was held before the Hon. J. Frank McLaughlin, Judge.

Feb. 12, 1947.

/s/ ALBERT GRAIN. [2024]

[Title of District Court and Cause No. 514.]

CERTIFICATE OF CLERK

United States of America,
District of Hawaii.—ss.

I, Wm. F. Thompson, Jr., Clerk of the United States District Court for the District of Hawaii, do hereby certify the foregoing pages numbered 1

to 2024, inclusive, to be a true and complete transcript of the record and proceedings had in said court in the above-entitled causes, as the same remains of record and on file in my office, and I further testify that the costs of the foregoing transcript of record are \$93.10 and that said amount has been charged by me in my account against the United States.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 4th day of August, 1948.

(Seal) /s/ WM. F. THOMPSON, Jr.,
Clerk, United States District Court, District of
Hawaii.

HONOLULU PLANTATION EXHIBIT 4-A

(Admitted in Evidence 12-3-46)

Land Court Document No. 63916

Cancelled Nov. 28, 1944

POWER OF ATTORNEY

Honolulu Plantation Company to P. E. Spalding,
L. D. Larsen, W. Jamieson and H. T. Kay

Know All Men by These Presents:

Honolulu Plantation Company, a corporation organized and existing under and by virtue of the laws of the State of California, and having its principal place of business in the City and County of San Francisco, in said State, does hereby make, constitute and appoint P. E. Spalding, L. D. Larsen, W. Jamieson and H. T. Kay, all residing at

Honolulu, in the Territory of Hawaii, and each of them, the true and lawful attorneys and attorney of said corporation, for it and in its name, place and stead, and as its act and deed to take charge and possession of all and singular the property, real and personal, belonging to said corporation and situated in the said Territory of Hawaii, and to care for and manage said property, to buy, sell, hire or otherwise dispose of or deal in goods, wares, merchandise, choses in action, and other personal property in possession or in action; to make loans and advances of money to others secured by either mortgage or pledge of real or personal property, or otherwise; to purchase, take on lease, receive and otherwise acquire lands, tenements and hereditaments, or any interest therein, and to accept seizin and possession thereof and delivery of all deeds and other assurances therefor; to lease or let to others, lands, tenements, hereditaments and to surrender leases and tenancies upon such terms and conditions as the said attorneys or attorney shall think fit; to ask, demand, sue for, recover, collect and receive all sums of money, debts, dues, accounts, interest, dividends, property and demands whatsoever as are now or shall hereafter become due, owing payable, deliverable or belonging to said corporation, and to have, use and take all lawful ways and means for the recovery thereof in the name of said corporation, or otherwise, by attachments, arrests, distress or otherwise, and to compromise, submit to arbitration, or otherwise adjust all claims and demands aforesaid and grant acquittances or

other sufficient discharges therefor; to commence, prosecute or enforce or defend, answer or oppose all actions, suits or other legal proceedings in which said corporation is or may hereafter be interested or concerned, and to compromise, refer to arbitration, abandon, submit to judgment, or become nonsuited, in any such action, suit or proceeding; to vote at all stockholders' meetings held in the Territory of Hawaii, of any company or companies, or otherwise to act as the proxy or representative of said corporation in respect of any shares of any company or companies now owned or which may hereafter be acquired by said corporation, and in connection therewith to execute any consents or other instruments in the name of said corporation as shall be necessary in the premises; to return for assessment of taxes all property of any description now or hereafter held or owned by said corporation in the Territory of Hawaii, and of all income earned or produced by said corporation from any source in said Territory of Hawaii, and to appeal against any assessment of such property or income; to concur with any other corporation or any person or persons in doing any of the acts, matters and things hereinbefore mentioned, and to sign, execute, deliver and acknowledge for and on behalf of said corporation and in its name, place and stead and as its act and deed such instruments in writing of whatever kind and nature as may be necessary or proper in the premises.

Hereby Giving and Granting unto the said attorneys or attorney full power and authority to do and

perform all and every act and thing whatsoever requisite, necessary or proper to be done in and about the premises as fully and to all intents and purposes as said corporation might or could do;

Hereby Ratifying and Confirming all that its said attorneys or attorney shall lawfully do or cause to be done by virtue of these presents.

This Power of Attorney shall revoke that certain power of attorney heretofore executed by Honolulu Plantation Company to R. A. Cooke, P. E. Spalding, L. D. Larsen and Alvah A. Scott, dated the 10th day of January, 1935, duly recorded in the Office of the Registrar of Conveyances in Honolulu in Book 1270, Pages 150 to 153, and upon the execution hereof, said former power of attorney shall become null and void.

In Witness Whereof, the said Honolulu Plantation Company has caused these presents to be executed by its officers thereunto duly authorized and its corporate seal to be affixed this 26th day of September, 1941.

HONOLULU PLANTATION
COMPANY,

By /s/ JOHN D. McKEE,
President.

By /s/ PETER LEWIS,
Secretary.

(Corporate Seal)

State of California,
City and County of San Francisco.—ss.

On this 21st day of October A. D., 1941, before me appeared John D. McKee and Peter Lewis, to me personally known, who being by me duly sworn, did say that they are the President and Secretary respectively of Honolulu Plantation Company, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and the said John D. McKee and Peter Lewis acknowledged said instrument to be the free act and deed of said corporation.

(Seal) /s/ LILLIAN RALSTON,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission Expires December 22, 1944.

State of California,
City and County of San Francisco.—ss.

I, H. A. van der Zee, County Clerk of the City and County of San Francisco, State of California, and ex-officio Clerk of the Superior Court thereof (the same being a Court of Record, having by law a seal), being the officer authorized by the laws of said State of California to make the following certificate, Do Hereby Certify: That Lillian Ralston, whose name is subscribed to the Jurat, Affidavit, or Certificate of the Proof or Acknowledgment of the annexed instrument, was, at the time of taking the

same, a Notary Public in and for said City and County of San Francisco, residing therein, duly commissioned, qualified and sworn and duly authorized by the laws of said State of California to take Jurats, Affidavits, and the Acknowledgments and Proofs of Deeds or Conveyances for lands, tenements or hereditaments in said State, to be recorded therein.

I further certify that I am well acquainted with the handwriting of said Notary Public and verily believe that the signature to said Jurat, Affidavit, Acknowledgment or Certificate is genuine, and that the said instrument is executed or acknowledged according to the laws of said State of California. Further that I have compared the impression of the seal affixed thereto with a specimen impression thereof deposited in my office pursuant to law, and that I believe the impression of the seal upon the original certificate is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Superior Court.

Dated: Oct. 22, 1941.

(Seal) /s/ H. A. VAN DER ZEE,
Clerk.

Honolulu, Hawaii, December 9, 1943.

I hereby certify that I have compared the foregoing copy with the original Power of Attorney given by Honolulu Plantation Company to P. E. Spalding et als, dated September 26, 1941, duly recorded in the office of the Registrar of Convey-

ances in Honolulu in Book 1684 Pages 247-250, and find same to be a full, true and correct copy of said original.

Attest:

(Seal) /s/ ALBERT K. AKANA,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

My Commission expires June 30, 1945.

The original of this document recorded as follows: Territory of Hawaii, Office of Bureau of Conveyances. Received for record this 4th day of November A. D. 1941 at 1:43 o'clock p.m. and recorded in Liber 1684 on Pages 247-250 and compared. Signed, M. N. Huckestein, Registrar of Conveyances.

HONOLULU PLANTATION EXHIBIT 4-B

(Admitted in Evidence 12-3-46)

Power of Attorney

Honolulu Plantation Company to P. E. Spalding,
S. L. Austin and/or H. T. Kay

Know All Men by These Presents:

Honolulu Plantation Company, a corporation organized and existing under and by virtue of the laws of the State of California, and having its principal place of business in the City and County of San Francisco, in said State, does hereby make, constitute and appoint P. E. Spalding, S. L. Austin and/or H. T. Kay, all residing at Honolulu, in the

Territory of Hawaii, and each of them, the true and lawful attorneys and attorney of said corporation, for it and in its name, place and stead, and as its act and deed to take charge and possession of all and singular the property, real and personal, belonging to said corporation and situated in the said Territory of Hawaii, and to care for and manage said property, to buy, sell, hire or otherwise dispose of or deal in goods, wares, merchandise, choses in action, and other personal property in possession or in action; to make loans and advances of money to others secured by either mortgage or pledge of real or personal property, or otherwise; to purchase, take on lease, receive and otherwise acquire lands, tenements and hereditaments, or any interest therein, and to accept seizin and possession thereof and delivery of all deeds and other assurances therefor; to lease or let to others, lands, tenements, hereditaments and to surrender leases and tenancies upon such terms and conditions as the said attorneys or attorney shall think fit; to ask, demand, sue for, recover, collect and receive all sums of money, debts, dues, accounts, interest, dividends, property and demands whatsoever as are now or shall hereafter become due, owning payable, deliverable or belonging to said corporation, and to have, use and take all lawful ways and means for the recovery thereof in the name of said corporation, or otherwise, by attachments, arrests, distress or otherwise, and to compromise, submit to arbitration, or otherwise adjust all claims and demands aforesaid and grant acquittances or other sufficient

discharges therefor; to commence, prosecute or enforce or defend, answer or oppose all actions, suits or other legal proceedings in which said corporation is or may hereafter be interested or concerned, and to compromise, refer to arbitration, abandon, submit to judgment, or become non-suited, in any such action, suit or proceeding; to vote at all stockholders' meeting held in the Territory of Hawaii, or any company or companies, or otherwise to act as the proxy or representative of said corporation in respect of any shares of any company or companies now owned or which may hereafter be acquired by said corporation, and in connection therewith to execute any consents or other instruments in the name of said corporation as shall be necessary in the premises; to return for assessment of taxes all property of any description now or hereafter held or owned by said corporation in the Territory of Hawaii, and of all income earned or produced by said corporation from any source in said Territory of Hawaii, and to appeal against any assessment of such property or income; to concur with any other corporation or any person or persons in doing any of the acts, matters and things hereinbefore mentioned, and to sign, execute, deliver and acknowledge for and on behalf of said corporation and in its name, place and stead and as its act and deed such instruments in writing of whatever kind and nature as may be necessary or proper in the premises.

Hereby Giving and Granting unto the said attorneys or attorney full power and authority to do

and perform all and every act and thing whatsoever requisite, necessary or proper to be done in and about the premises as fully and to all intents and purposes as said corporation might or could do;

Hereby Ratifying and Confirming all that its said attorneys or attorney shall lawfully do or cause to be done by virtue of these presents.

This Power of Attorney shall revoke that certain power of attorney heretofore executed by Honolulu Plantation Company to P. E. Spalding, L. D. Larsen, W. Jamieson and H. T. Kay, dated the 26th day of September, 1941, duly recorded in the Office of the Registrar of Conveyances in Honolulu in Book 1684, Pages 247 to 250, and upon the execution hereof, said former power of attorney shall become null and void.

In Witness Whereof, the said Honolulu Plantation Company has caused these presents to be executed by its officers thereunto duly authorized and its corporate seal to be affixed this 28th day of November, 1944.

HONOLULU PLANTATION
COMPANY,

By /s/ ARTHUR E. CORDER,
Vice-President.

By /s/ F. F. DIXON,
Secretary.

(Corporate Seal)

State of California,
City and County of San Francisco.—ss.

On this 28 day of November, A. D., 1944, before me appeared Arthur E. Corder and F. F. Dixon, to me personally known, who being by me duly sworn, did say that they are the Vice-President and Secretary respectively of Honolulu Plantation Company, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and the said Arthur E. Corder and F. F. Dixon acknowledged said instrument to be the free act and deed of said corporation.

(Seal) /s/ FLORENCE HANEY,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission Expires May 22, 1945.

State of California,
City and County of San Francisco.—ss.

I, H. A. van der Zee, County Clerk of the City and County of San Francisco, State of California, and ex-officio Clerk of the Superior Court thereof (the same being a Court of Record, having by law a seal), being the officer authorized by the laws of said State of California to make the following certificate, Do Hereby Certify: That Florence Haney, whose name is subscribed to the Jurat, Affidavit, or Certificate of the Proof or Acknowledgment of the annexed instrument, was, at the time of taking the

same, a Notary Public in and for said City and County of San Francisco, residing therein, duly commissioned, qualified and sworn and duly authorized by the laws of said State of California to take Jurats, Affidavits, and the Acknowledgments and Proofs of Deeds or Conveyances for lands, tenements or hereditaments in said State, to be recorded therein.

I further certify that I am well acquainted with the handwriting of said Notary Public and verily believe that the signature to said Jurat, Affidavit, Acknowledgment or Certificate is genuine, and that the said instrument is executed or acknowledged according to the laws of said State of California. Further that I have compared the impression of the seal affixed thereto with a specimen impression thereof deposited in my office pursuant to law, and that I believe the impression of the seal upon the original certificate is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Superior Court.

Dated: Nov. 29, 1944.

(Seal) /s/ H. A. VAN DER ZEE,
Clerk.

Honolulu, Hawaii, December 20, 1944.

I hereby certify that I have compared the foregoing copy with the original Power of Attorney, given by Honolulu Plantation Company to P. E. Spalding, S. L. Austin and H. T. Kay, dated November 28, 1944, duly recorded in the office of the Registrar of Conveyances in Honolulu in Book

1858 Pages 497-500 and find the same to be a full, true and correct copy of said original.

.....

Notary Public, First Judicial Circuit, Territory of
Hawaii.

My Commission expires June 30, 1945.

The original of this document recorded as follows: Territory of Hawaii, Office of Bureau of Conveyances. Received for record this 7th day of December A. D. 1944 at 9:54 o'clock A.M. and recorded in Liber 1858 on Pages 497-500 and compared. Signed M. N. Huckesfein, Registrar of Conveyances.

HONOLULU PLANTATION EXHIBIT No. 6
(Admitted in Evidence 12-3-46)

SUMMARY OF AREAS TAKEN BY THE UNITED STATES
FROM HONOLULU PLANTATION COMPANY

Civil Case No.	Total Acres in Suit	Acres under control of H. P. Co.			
		Total	Caneland	Contribu- tory	Other Lessor to Use H.P. Co.
514	257.654	152.663	134.49	15.762	2.411
521	49.058	4.822	.....	.....	4.822
525	216.124	80.351	66.82	2.880	10.651
527	93.355	93.355	85.74	2.164	5.451
529	344.893	344.059	283.74	12.683	47.636
532	8.279	8.279	.....	.....	8.279
533	218.349	145.000	48.61	3.580	92.810
535	145.225	145.225	135.17	10.055	.....
536	26.922	23.509	.....	.....	23.509
540	124.914	1.400	.....	.....	1.400
544	317.705	310.200	294.01	16.190	.....
548	63.725	39.500	25.30	1.690	12.510
684	29.981	15.983	13.71	.....	2.273
		1,896.184	1,364.346	1,087.59	65.004 211.752

(Retyped 12/3/46 in sextpl. from 11/25/46 copy)

Honolulu Plantation Exhibit No. 6—(Cont'd)

1301

Civil Case No.	Owner	Total Acres in Suit	Acres under Control of H. P. Co.						Other Use
			Total	Cane Field No.	Cane By Field	Cane By Owner	Cane By R/E	Contrib.	
514	Damon Estate	235.972	130.981	84	112.98	119.21	123.83	11.771	
				79	6.23				
	Queen Emma Estate.....	21.682	21.682	79	3.25				
				84	1.37				
					4.62				
				81	10.66		10.66		
						15.28		3.991	2.411
	Totals.....	257.654	152.663		134.49	134.49	134.49	15.762	2.411
521	H. P. Co. Fee.....	0.577	0.577						0.577
	Alului Estate	2.698	2.698						2.698
	McCandless Estate	1.547	1.547						1.547
	Cooper Estate	44.236							
	Totals.....	49.058	4.822						4.822
525	Damon Estate			88	34.86				
				89	31.96				
	Totals.....	216.124	80.351		66.82	66.82	66.82	2.880	10.651
527	Damon Estate			91	47.75				
				92	11.96				
							59.71		
				107	26.03		26.03		
	Totals.....	93.355	93.355		85.74	85.74	85.74	2.164	5.451

Honolulu Plantation Exhibit No. 6—(Cont'd)

Civil Case No.	TAKINGS BY PLTN. RECORD			TAKINGS AS PER GOV'T.			
		Field No.	Cane by Field				
529	1st Taking 3/8/43	Bishop Estate	3 7.79	Bishop Estate	7.84		
	2nd Taking 1/14/44	Haw'n. Land & Imp.	4 3.51	{	Bishop Estate	56.96	
		Bishop Estate	3 7.10				
		Bishop Estate	4 76.20				
	3rd Taking Apr. 14-21/44	Haw'n. Land & Imp.....	4 1.30			Bishop Estate	40.424
		Haw'n. Land & Imp.	6 44.42			Haw'n. Land & Imp.....	64.285
		Haw'n. Land & Imp.	7 43.80				
		Bishop Estate	4 55.70		Haw'n. Land & Imp.	29.784	
		Bishop Estate	6 1.68		Bishop Estate	66.090	
	4th Taking June 1944	Bishop Estate	3 1.38	{			
		Haw'n. Land & Imp.	7 10.61			Haw'n. Land & Imp.	11.155
		Bishop Estate	5 26.82			Bishop Estate	40.330
		H. P. Co. Fee.....	5 .18			H. P. Co. Fee	1.627
		McCandless	5 3.25			McCandless	12.924
		(No Cane)				Bishop (Oahu Sugar Lease)..	3.9
						Bishop (Oahu Sugar Lease)..	8.740
		Totals.....	283.74				344.059

SUMMARY	Total in Suit	Control by H.P. Co.	Total Cane	Contributory	Other Use
Bishop Estate.....	212.436	211.644	176.67		
Bishop (Oahu Sugar Lease).....	12.640	12.640			
Haw'n. Land & Imp. Co.....	105.224	105.224	103.64		
McCandless.....	12.924	12.924	3.25		
H. P. Co.—Fee.....	1.627	1.627	0.18		
Others.....	0.042				
Totals.....	344.893	344.059	283.71	12.683	47.636

		Acres under Control of H. P. Co.							Other Use
Civil Case No.	Owner	Total Acres in Suit	Total	Cane Field No.	Cane by Field	Cane by Owner	Cane By R/E	Contrib.	
532	Queen Emma	8.279	8.279						8.279
533	Bishop Estate (Oahu S. Co.—lease)	218.349	145.00	1	48.61	48.61	48.61	3.58	92.81
535	Bishop Estate	98.961	98.961	62	92.175			6.786	
	McCandless	0.545	0.545	62	0.545	4.515			
							92.72		
	Bishop Estate	15.076	15.076	61	14.71		14.71	.366	
	Bishop Estate	26.195	26.195	61	23.56		23.56	2.635	
	Bishop Estate	1.716	1.716	56	1.448		1.448	.268	
						131.893			
	Hon. Pltn. Co.—Fee	2.732	2.732	56	2.732	2.732	2.732		
	Totals.....	145.225	145.225		135.17	135.17	135.17	10.055	
536	Austin Estate	26.078	22.665						22.665
	Francis Brown .....	.844	.844						.844
	Totals.....	26.922	23.509						23.509
540	Bishop Estate et al.....	124.914	1.40						1.40
544	Damon Estate			82	46.95				
				83	66.53				
							112.03		
				88	12.81				
				86	82.89				
				85	84.83				
							180.53		
	Totals.....	317.705	310.20		294.01	294.01	294.01	16.19	
548	Damon Estate	63.725	39.5	87	25.30	25.30	25.30	1.690	12.510
684	Damon Estate	16.936	3.93	84	1.16				
				87	2.77				
						3.93	3.93		
	Queen Emma Estate	9.132	8.783	79	3.95				
				71	2.56				
						6.51	6.51		
	Bishop Estate	3.523	3.27	63	3.27	3.27	3.27		
	Totals.....	29.891	15.983		13.71	13.71	13.71		2.273

HONOLULU PLANTATION EXHIBIT No. 7
(Admitted in Evidence 12-3-46)

HONOLULU PLANTATION COMPANY—STATEMENT OF LANDS—DECEMBER 31, 1944

Exhibit "H"

Lessors	Location	Date of Expiration	Annual Rental	Cane Area Acres	Bldgs. and Camp Sites	Reservoirs and Fish Ponds	Pine Veg. and Pasture	Roads and Railroads	Miscellaneous and Waste	Total Area Acres
S. M. Damon Estate.....	Moanalua	Dec. 31, 1953	\$1,360.00	64.75	.....	.....	.....	1.82	1.43	68.000
Edith Austin, et al.....	Waimalu	Dec. 31, 1965	None	.....	.....	.....	.....	.....	1295.00†	1295.000
Edith Austin, et al.....	Waimalu	Dec. 31, 1965	5%*	585.40	3.07	2.86	.....	19.75	996.16	1607.240
Queen Emma Estate.....	Aiea	Dec. 31, 1965	\$ 50.00	.....	.....	.....	1.72	.....	.....	1.720
Queen Emma Estate.....	Halawa	Dec. 31, 1965	5%*	412.13	3.00	.....	637.56	24.85	411.739	1489.279
Queen Emma Estate.....	Halawa	Dec. 31, 1965	None	.....	.....	.....	.....	.....	1145.00†	1145.000
L. L. McCandless Estate.....	Waieie	Dec. 31, 1963	\$1,647.50	29.34	.....	1.00	.....	2.83	78.83	112.000
L. L. McCandless Estate.....	Kalauao	Jan. 1, 1945	477.68	3.50	.596	2.10	.....	.....	7.445	13.641
L. L. McCandless Estate.....	Kalauao	Tenacy	583.08	9.56	.....	.....	.....	.056	5.558	15.174
L. L. McCandless Estate.....	Halawa	Exchange Lease	300.00	4.11	.542	.....	.....	.09	1.257	5.999
L. L. McCandless Estate.....	Kalauao	Tenacy	.....	3.90	.....	.....	.....	.....	.....	3.900
Territory of Hawaii.....	Waimano-Uka	July 25, 1964	100.00	.....	.....	2.07	.....	13.16	.....	15.230
Territory of Hawaii.....	Aiea	Mar. 2, 1952	20.00	.....	.853	.....	.....	.....	.....	.853
Secretary of War, U.S.A.....	Halawa	April 3, 1945	52.64	1.36	.....	.....	.....	.....	6.16	7.520
Oahu Railway & Land Co.....	Waimano-Manana	Dec. 31, 1965	5%*	612.47	.75	2.67	.17	22.67	93.345	732.075
Oahu Railway & Land Co.....	Manana	Dec. 31, 1965	\$ 358.00	18.16	.20	.....	5.55	1.23	38.30	63.440
B. P. Bishop Estate.....	Halawa	Dec. 31, 1965	5%*	1258.82	12.27	26.50	193.141	63.30	799.984	438.556
	Aiea									10.862
	Kaonohi									641.370
	Kumuulu									1037.454
	Waiau and Waimalu									2.935
B. P. Bishop Estate.....	Waiau	Dec. 31, 1965	None	.....	.....	.....	.....	.....	.....	2.130
	Waimano									2.067
	Waiawa									218.641
	Halawa									2323.600
B. P. Bishop Estate.....	Kaonohi	Dec. 31, 1965	None	.....	.....	.....	.....	.....	865.00†	865.000
B. P. Bishop Estate.....	Kumuulu	Dec. 31, 1965	None	.....	.....	.....	.....	.....	1170.00†	1170.000
B. P. Bishop Museum:										
Parcel "A".....	Kalauao	Dec. 31, 1965	5%*	141.63	4.83	5.20	130.50	9.00	37.55	328.710
Parcel "B".....	Kalauao	Dec. 31, 1965	None	.....	.....	.....	.....	.....	635.00†	635.000
Oahu Sugar Co., Ltd. (Sublease).....	Waiawa	June 30, 1965	\$ 261.55	2.25	.....	.....	9.88	.90	7.629	20.659
Sundry Leases.....				11.64	.582	.....	.089	.974	6.063	19.348
Total Leased Lands.....				3159.02	26.693	42.10	978.610	160.630	9925.050	14,292.403
Fee Simple Lands.....				150.73	145.273	.....	10.212	12.780	67.732	386.727
Total all Lands.....				3309.75	171.966	42.10	988.822	173.410	9992.782	14,679.130

* Gross Raw Sugar Produced.

† Forest Reserve.

HONOLULU PLANTATION EXHIBIT 9-A

(Admitted 12-3-46)

Received Aug. 14, 1941

Answered Aug. 19/41

Bishop Trust Company
Limited

August 18, 1941

C. Brewer & Company, Ltd.

Honolulu, T. H.

Attention: Mr. Chas. H. Merriam, Manager,
Land Department

Re: Estate of L. L. McCandless, Deceased.
Expiration of Lease—L. L. McCandless to
Honolulu Plantation Company of various
lands in Manana-Iki, Waiawa and Ka-
lauao, Ewa, Oahu, Issued October 20, 1909,
Recorded in Book 320, Page 356.

Gentlemen:

Reference is made to your letter of April 9, 1941,
File 476-CHM, addressed to Mr. Lester Marks and
Bishop Trust Company, Limited.

The contents of your lease (letter) have been
very carefully discussed with Mr. Marks and we are
authorized to advise you that the continued occupa-
tion of the land demised by the above mentioned
lease will be permitted for an indefinite period,
subject to either the issuance of a new tenancy or
the sale of the land, or failing both such procedures,
then upon the issuance of two years notice that the
tenancy at will is to be terminated. This consent

is specifically given by A. Lester Marks, Executor, and Bishop Trust Company, Limited, Administrator C.T.A. of the estate of L. L. McCandless, Deceased, and is to be binding only during the administration of the probate estate at the end of which period our joint responsibility for the property in question will cease and come under the control of the Trustees under the will and of the estate of L. L. McCandless, deceased.

Yours very truly,

/s/ E. BENNER, JR.,

Asst. Vice-President.

EB:BP

Honolulu Plantation Co. Land File Subject No. 155.

This Indenture of Lease made this 20th day of October, 1909, between L. L. McCandless, hereinafter called the "Lessor," which expression shall include his heirs, executors, administrators and assigns, party of the first part, and the Honolulu Plantation Company, a corporation duly organized and existing under the laws of the State of California and legally doing business in the Territory of Hawaii, hereinafter called the "Lessee," which expression shall include the Lessee and its successors and assigns, party of the second part;

Witnesseth:

That the Lessor in consideration of the rents hereunder reserved and of the covenants herein contained and on the part of the Lessee to be observed

and performed, does hereby demise and lease unto the Lessee all the following pieces or parcels of land, all situate on the Island of Oahu, Territory of Hawaii:

(1) All that certain parcel of land situate at Mananaiki, District of Ewa, and more particularly described in R.P. 871, L.C.A. 7732;

(2) All that certain parcel of land situate at Waiawa, District of Ewa, and more particularly described in R.P. 223, L.C.A. 9373;

(3) All that certain parcel of land situate at Waiawa, District of Ewa, and more particularly described in R.P. 208, L.C.A. 9377, to Lio;

(4) All that certain parcel of land situate at Mananaika, District of Ewa, and more particularly described in R.P. 870, L.C.A. 9378;

(5) All that certain parcel of land situate at Kachai, Mananaiki, District of Ewa, and more particularly described in R.P. 6240, L.C.A. 7723;

(6) All that parcel of land at Kapaloa, Waiawa, District of Ewa, and more particularly described in R.P. 875, L.C.A. 9376;

(7) All that certain parcel of land situate at Kaonohi, Kalauao, District of Ewa, and more particularly described in R.P. 4813, L.C.A. 6156E to Naue;

(8) All that certain parcel of land situate at Kalauao, District of Ewa, and more particularly described in R.P. 749, L.C.A. 9297;

(9) All that certain parcel of land situate at Kalauao, District of Ewa, and more particularly described in R.P. 2860, L.C.A. 9404, to Nowelo, and

being the same land described in the lease dated December 15, 1898, from Keaka Kaina to Yong Kan, and recorded in Liber 185, on page 175 et seq., Hawaiian Registry of Deeds.

(10) All that certain parcel of land situate at Kalauao, District of Ewa, and more particularly described in R.P. 450, L.C.A. 6158, to Pao; and being the same premises described in said lease from Keaka Kaina to Yong Kan.

Paragraphs 9 and 10 in the lease L. L. McCandless to Honolulu Plantation Co. in Book 320, page 356, are intended to include a large portion of L.C.A. 9404, and a portion of L.C.A. 8324, North of the river, and South of the road, containing an area of 3.1 acres. The reference to L.C.A. 6158 is an error, and should not be considered at all, as said award is located about 1800 feet South West of the Yong Kan leased land, which comprises portions of L.C.A. 9404 and 8324.

Land Dept. C. Brewer & Co., Ltd., per Chas. H. Merriam.

(11) All that certain parcel of land situate at Kalauao, District of Ewa, containing an area of 3½ acres more or less, and more particularly described in that certain indenture of lease dated the 24th day of October 1898, between Kuohao and Young Chung, and which said lease is recorded in Liber 184, on pages 434-435, Office of the Registrar of Conveyances in Honolulu;

(1) All that certain parcel of land situate at Kalauao, District of Ewa, and more particularly described in R.P. 3082, L.C.A. 5844-9350, to Puleui,

containing an area of 7.58 square chains, and constituting and being the same premises conveyed to said L. L. McCandless by deed of Haneoo and husband dated May 22, 1901, and recorded in Liber 223, on page 190, records of said Registrar's office;

(13) All that certain parcel of land situate at Mananaiki, District of Ewa, and more particularly described in R.P. 159, and containing an area of 10.96 acres; excepting and reserving therefrom however, all that portion of said premises which is not now or has not been under cultivation..... by said lessee and lying easterly of its present cane fields;

(14) All that certain parcel of land situate at Kalauao, District of Ewa, and more particularly described in R.P. Grant 169 to W. E. Gill, and containing an area of 16.4 acres more or less, saving, reserving and excepting however therefrom all that portion of said Grant more particularly **described as follows:**

Commencing at the East corner of the lot at angle of fence on the makai side of Government Road and running:

1. N. 48° 10' W. true 244 feet along Alaeauui to stream,
2. S. 60° 15' W. true 430 feet down stream,
3. S. 18° 10' E. true 187 feet along remaining portion of Grant 169 along Kuauna to post on Kula land,
4. S. 5° 5' W. true 154 feet along same along fence,

5. S. $29^{\circ} 30'$ W. true 172 feet along same along fence,
6. S. $54^{\circ} 15'$ W. true 148 feet along same along fence to large Kiawe tree a short ways mauka of old Rice floor;
7. S. $41^{\circ} 5'$ E. true 70 feet along same along fence;
8. N. $51^{\circ} 50'$ E. true 671 feet along Paaiau L.C. Award 5365 to W. Steven along fence; thence
9. N. $29^{\circ} 35'$ E. true 302 feet along same along fence to initial point. Area 5.25 acres.

All of the water on the said premises hereinabove reserved and designated as 5.25 acres is not reserved however, but the right to use all surplus water from the springs on said land reserved, is hereby granted, demised and let to the Lessee for the term of this lease.

To Have and to Hold the premises hereby demised unto the said lessee for the term of thirty (30) years from January 1, 1910, the lessee yielding and paying during said term unto the said lessor for the several premises hereby demised annual rents as follows, to wit:

Fifteen Dollars (\$15.) for premises heretofore described in (1)

Twenty Dollars (\$20.) for premises heretofore described in (2)

Thirty-five Dollars (\$35.) for premises heretofore described in (3)

Twenty-five Dollars (\$25.) for premises heretofore described in (4)

Fifty-six Dollars (\$56.) for premises heretofore described in (5)

Fifty-two Dollars (\$52.) for premises heretofore described in (6)

Thirty Dollars (\$30.) for premises heretofore described in (7)

Thirty Dollars (\$30.) for premises heretofore described in (8)

Thirty-seven and a half Dollars (\$37.50) for premises heretofore described in (9) and (10)

Sixty Dollars (\$60.) for premises heretofore described in (11)

Thirty Dollars (\$30.) for premises heretofore described in (12)

Three Hundred Twenty-five Dollars (\$325.) for **premises** heretofore described in (13)

Five Hundred Fifteen Dollars (\$515.) for premises heretofore described in (14)

being a total annual rental of \$1230.50 payable semi-annually in advance on the first days of January and July in each and every year without deduction.

Provided However, and It Is Understood and Agreed that if Hana L. Pooloa is living on January 1, 1917, this lease as far as it affects the premises described in No. (14) shall be subject to the life interest of said Hana L. Pooloa from said date of January 1, 1917, for the rest and remainder of her natural life after said date, and in such event the rent for the premises described in No. (14) during the lifetime of said Hana L. Pooloa from and after said date of January 1, 1917, shall cease, and the same shall become again payable at the

aforesaid rate upon her death, and said L. I. McCandless will use his best endeavors to obtain a lease from said Hana L. Pooloa for said lessee from **said date of January 1, 1917**, for the rest of her natural life after said date at an annual rental not exceeding Five Hundred Fifteen Dollars (\$515.), for all of the premises described in No. 14.

And the Lessor hereby covenants with the Lessee that upon payment by the Lessee of the rent as aforesaid and upon observance and performance of the covenants by the Lessee hereinafter contained, the Lessee shall peaceably hold and enjoy the said demised premiss for the term hereby demised, without hindrance or interruption by the Lessor or any other person or persons lawfully or equitably claiming by, through or under him, except as to the **said interest of Hana L. Pooloa**, from and after January 1, 1917, as aforesaid. And the said Lessor and the said Lessee hereby agree that the rentals hereby agreed to be paid by the Lessee to the Lessor shall be in lieu of all rentals now paid by the Lessee to the Lessor for any and all of the premises hereby demised, and that all existing leases between the Lessor and the Lessee of the said premises hereby demised, or part thereof, are hereby cancelled.

And the Lessee hereby covenants with the Lessor that it (the Lessee) will pay said rent in U. S. Gold Coin in manner aforesaid without any deduction; that it will also pay all taxes, rates, assessments, impositions, duties and other outgoings of every description to which said premises or any part thereof may during said term become liable, and

whether the same taxes, rates, assessments, impositions, duties and other outgoings are or shall be assessed to or be payable by law by either the Lessor or Lessee; that it will not make or suffer any strip or waste or unlawful, improper or offensive use of said premises or of any improvements thereon; that it will permit the Lessor or his agents at all seasonable times during the term hereby demised to enter the said premises and examine the condition thereof; that it will not without the written consent of the Lessor assign this lease or any interest therein, except by way of mortgage or deed of trust to secure bonded indebtedness, or underlet the premises or any part thereof without such consent; and that at the end of said term or other sooner determination of this lease it will peaceably deliver up to the Lessor possession of the said demised premises, together with all erections and improvements upon or belonging to the same by whomsoever made.

And it is mutually understood and agreed by the parties hereto that in the event that that certain indenture by way of exchange lease this day made and entered into by the said Honolulu Plantation Company, as party of the first part, and said L. L. McCandless, as party of the second part, shall be terminated by the re-entry of either party thereto pursuant to the provisions therefor in said indenture contained, then these presents and the estate hereby created shall likewise cease and determine.

Provided However, that if the Lessee shall fail to pay the said rent as above set forth or shall fail to faithfully observe or perform any of the cove-

nants herein contained and on its part to be observed and performed, or shall abandon the said premises, the Lessor may after thirty (30) days written notice of any such failure or non-observance, and said failure or non-observance still continuing after said thirty (30) days, re-enter said demised premises and at his option terminate this lease without service of legal process and without prejudice to any other remedy or right of action for arrears of rent or for any other proceeding for breach of contract.

And it is hereby expressly agreed and declared that the acceptance of rent by the Lessor shall not be deemed to be a waiver by him of any breach by the Lessee of any covenant herein contained.

In Witness Whereof, the said parties hereto have hereunto and to another instrument of the same date and tenor set their hands and seals the day and year first above written.

/s/ L. L. McCANDLESS.

HONOLULU PLANTATION
COMPANY,

By /s/ GEO. ROSS,

Its Attorney in Fact.

And I, Kahiliopua Manuel, widow of Antone Manuel, do hereby lease and demise unto the Honolulu Plantation Company, all my right, title and interest, being my dower interest, in the premises described in R. P. 159, subject to reservation mentioned in the foregoing lease for the term of thirty (30) years from January 1st, 1910, or until my

death if within thirty years, and upon the terms mentioned in the foregoing lease, and do hereby consent to and approve of the foregoing lease dated October 20, 1909, by L. L. McCandless to Honolulu Plantation Company, provided that one-third of the rent of Three Hundred Twenty-five Dollars (\$325.) per annum be paid to me during said term of thirty years, or until my death, if within thirty years.

In Witness Whereof, I have hereunto set my hand and seal this.....day of October, 1909.

.....

The original of this document recorded as follows: Territory of Hawaii, Office of Bureau of Conveyances. Received for record this 9th day of November A. D. 1909 at 11:34 o'clock A.M. and recorded in Liber 320 on Pages 356-361 and compared. (Signed) Chas. H. Merriam, Registrar of Conveyances.

HONOLULU PLANTATION EXHIBIT 9-B

Admitted in Evidence 12-3-46

Agreement made this 6th day of November, 1939, by and between Honolulu Plantation Company, a California corporation, doing business in the Territory of Hawaii, hereinafter called the First Party, and L. L. McCandless, of Honolulu, City and County of Honolulu, Territory of Hawaii, hereinafter called the Second Party.

Witnesseth:

Whereas, the said First Party and the said Second Party duly entered into an exchange lease dated October 20th, 1909, which said lease is not recorded, whereby the said First Party demised to said Second Party a certain area of land in the Ahupuaa of Waimalu, District of Ewa, Island of Oahu, lying mauka of the cane fields of the said First Party and extending to the Forest Reserve line, as in said Exchange Lease more particularly described, and

Whereas, by the said Exchange Lease the said Second Party demised to said First Party certain parcels of land or interests therein, situate in the Ahupuaa of Halawa, said District of Ewa, as in said Exchange Lease, are more particularly described, and

Whereas, the said First Party and the said Second Party desire to extend the said Exchange Lease for a period of Five (5) Years from September 1, 1939, subject, however, to certain additional agreements as herein set forth;

Now, Therefore, This Agreement Witnesseth:

1. That the said First Party and the said Second Party do hereby extend the said above mentioned Exchange Lease for a term of Five (5) Years from September 1, 1939, upon the same terms and provisions as therein set forth except as altered by this agreement.

2. That the said Second Party hereby demises and leases to said First Party for the term of Five

Years commencing September 1, 1939, and ending August 31, 1944, all right, title and interest of the said Second Party in and to the following additional lands acquired by said Second Party since October 20, 1909:

(a) R.P. 765 L.C.A. 9332, Apana 2, area 0.156 acre

(b) R.P. 758 L.C.A. 2096, Apana 1, area 0.620 acre

(c) R.P. 455 L.C.A. 2016, Apanas 1 and 2, area 0.326 acre

(d) Together with any other lands or interest in lands owned by said Second Party in said Halawa with the exception of Apana 1 R.P. 765 L.C.A. 9332 hereinbelow reserved, and said First Party hereby accepts said tenancy subject to the terms of said Exchange Lease and also subject to the terms hereof.

3. That said Second Party reserves from this demise all of Apana 1, R.P. 765 L.C.A. 9332 to Kaheana. It is agreed by and between the parties hereto that the non-inclusion of said Apana 1, R.P. 765 L.C.A. 9332 shall not in any way jeopardize any of the rights whether water, riparian or otherwise that may belong to said Apana 1, R.P. 765 L.C.A. 9332 now claimed by the Second Party hereto.

4. That said First Party hereby agrees that it will waive the restriction set forth in the above mentioned exchange lease that limits the use of the Waimalu land to pasture purposes only and that for the period of five years ending August 31, 1944,

the said Second Party shall have the right to use said land in any agricultural way desired except that the land shall not be used for the cultivation of sugar cane. The land referred to in this paragraph is hereby understood and agreed to mean the land lying between Waimalu Stream and the boundary of the land of Waiau and to be the area mauka of the present cane fields and extending to the forest reserve line.

5. The parties hereto mutually agree to delete and make void all of that paragraph numbered “(1)” on page 4 of said Exchange Lease that grants to said First Party a right of way for a pipe line under, over and across the lands owned or held by said Second Party in Waimalu Valley lying mauka of the government road and makai of the pumping station of said First Party.

6. That said First Party will pay to said Second Party annually, in advance, on the first day of September of each year during the term of this Agreement, the sum of Three Hundred Dollars (\$300.00) as rental to said Second Party of the right to maintain its Pump Pipe Line across L.C.As. 2137 Apana 2, 2055 Apana 1, 2016 Apana 1, and 2131 Apana 2, or any other land belonging to the party of the second part lying between Halawa Pump No. 1 and mauka government highway,—and for the use of the premises described in paragraph 2 hereinabove as (a), (b), (c) and (d).

This Agreement shall be binding upon the heirs, executors, administrators, successors and assigns of each of the parties hereto.

In Witness Whereof, the said First Party has caused this instrument to be executed in quadruplicate on the 13th day of November, 1939, and the said Second Party has likewise caused this instrument to be executed in quadruplicate on the 6th day of November, 1939.

HONOLULU PLANTATION
COMPANY,

By /s/ P. E. SPALDING,
Its Attorney-in-fact.

/s/ L. L. McCANDLESS.

Territory of Hawaii,
City and County of Honolulu.—ss.

On this 13th day of November, A.D., 1939, before me personally appeared P. E. Spalding, to me personally known, who, being by me duly sworn, did say that he is attorney-in-fact of Honolulu Plantation Company, duly appointed under power-of-attorney dated the 10th day of January, 1935, recorded in Book 1270 Page 150; and the foregoing instrument was executed in the name and behalf of said Honolulu Plantation Company by said P. E. Spalding as its attorney-in-fact; and said P. E. Spalding acknowledged said instrument to be the free act and deed of said Honolulu Plantation Company.

/s/ CHAS. H. MERRIAM,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

Territory of Hawaii,

City and County of Honolulu.—ss.

On this 6th day of November, A. D., 1939, before me personally appeared L. L. McCandless, to me known to be the person described in and who executed the foregoing instrument and acknowledged that he executed the same as his free act and deed.

/s/ HAROLD C. NOTT,

Notary Public, First Judicial Circuit, Territory of Hawaii.

This Indenture made this 20th day of October, (1909) between Honolulu Plantation Company, a California corporation doing business in the Territory of Hawaii, party of the first part, and L. L. McCandless, of Honolulu, in said Territory of Hawaii, party of the second part.

Witnesseth: That the party of the first part, in consideration of the lease hereinafter to it made by the party of the second part, and of the covenants and conditions hereinafter expressed and to be observed and performed by the party of the second part, does hereby lease and demise unto said party of the second part, for pasturage purposes only, the following lands in the District of Ewa, on the Island of Oahu, in said Territory:

All the portion or portions of the lands demised to John A. Buck (and by him held thereunder for the use and benefit of said Honolulu Plantation Company) by lease from Herbert and Walter Austin, Executors and Trustees under the Will of James W. Austin, deceased, dated May 3rd, 1898,

recorded in the Registry Office in said Honolulu in Liber 184, pages 436-443, and also all the portions of the land demised to said Honolulu Plantation Company by Ariana E. Austin and others by lease dated September 21st, 1906, recorded in said Registry Office in Liber 288, pages 24-28, which lie mauka or above the present cane fields of said party of the first part, the same being now pasture lands; the lower or makai boundary line of said premises hereby intended to be demised is as follows, to wit:

Beginning at a point on the Waiau boundary of the land demised by said Austin Estate Lease of May 3rd, 1898, on a line forty feet mauka of the mauka edge of the present irrigation ditch situate mauka of the cane fields lying farthest mauka of the party of the first part, and thence across said premises demised by said lease of May 3rd, 1898, following said forty foot line mauka of said irrigation ditch to a point on the westerly edge of a branch of Waimalu Gulch, thence running in a south-easterly direction down said branch gulch of Waimalu Gulch to a fence bordering on a canefield in Waimalu Gulch immediately opposite and near a gate on the road leading mauka in Waimalu Gulch. Excepting and Reserving to the party of the first part all water, water rights, and privileges belonging or appurtenant to or connected with said land; provided however, that the said party of the second part shall have the right to use so much of said water as is now undeveloped on said lands hereby demised as may be necessary for his stock

pasturing on said lands hereby demised. And reserving also all rights by said leases from the Austin Estate respectively given to the lessees thereunder to build waterheads and flumes and to run ditches, flumes, pipes and trestles on said demised lands, and all rights of way and privileges in connection therewith, as granted by said leases or either of them to the lessees thereunder, for the purposes therein mentioned; and subject further to all reservations, terms, stipulations and conditions in said leases or either of them contained for the benefit of the lessors thereof, and all other covenants therein with respect to the use of the demised lands. But the foregoing reservations shall not prejudice or affect in any way the existing rights of the party of the second part in or to the water of the Waimalu Stream and its tributaries.

To Have and to Hold the said demised land (subject to said exceptions and reservations) unto the said party of the second part, his executors, administrators and assigns, for the term of thirty (30) years from the first day of September 1909, without payment of rent and by way of exchange for the lease and the accompanying conditions and agreements hereinafter set forth on the part of the party of the second part in favor of the party of the first part.

And said party of the second part, in consideration of the premises and the foregoing lease to him made by the party of the first part, and the covenants of the party of the first part hereinafter expressed, does hereby lease and demise unto said

party of the first part all and singular his lands and interests in all lands whatsoever belonging to said party of the second part situate in Halawa, in said District of Ewa, including the following:

1. All the lands described in R. P. 770, L. C. A. 2137, to Williams (two apanas), and R. P. 767, L. C. A. 2055, to Williams (two apanas), excepting the dower interest of Kahalauaola Williams, widow of John Williams.

2. An undivided one-eighteenth ($1/18$) interest (representing .217 of an acre out of an entire area of 3.899 acres) in the land described in R. P. 763, L. C. A. 1983, to Kapule, (one apana).

3. An undivided five-thirty-sixths ($5/36$) interest (representing .114 of an acre out of an entire area of .819 of an acre) in the land described in R. P. 762, L. C. A. 2042, to Kauohilo (two apanas).

4. An undivided one-third ($1/3$) interest (representing 1.069 acres out of an entire area of 3.206 acres) in the land described in R. P. 769, L. C. A. 1996 to Naea (one apana).

5. All of the land described in R. P. 457, L. C. A. 2131 to Kanihoalii, 1.96 acres (two apanas).

6. An undivided $1/3$ interest in the land described in R. P. 765 L. C. A. 9332 Apana 1 to Kaheana.

7. Also all other lands and interests in lands of the party of the second part in said Halawa, and now owned by him.

To Have and To Hold the said Halawa lands, whether hereinabove specifically named or described or not, unto the said party of the first

part, its successors and assigns, for the said term of thirty (30) years from September 1st, 1909, without payment of rent and by way of exchange for the lease of the lands hereinabove demised by the party of the first part to the party of the second part and the accompanying conditions and covenants herein contained on the part of the party of the first part in favor of the party of the second part.

It Is Hereby Expressly Conditioned and Agreed between said parties respectively:

1. That the party of the first part shall have a full and sufficient right of way, subject to rights of tenants now existing under existing leases, for a pipe line under, over and across any and all lands owned or held by the party of the second part mauka of the Government Road in Waimalu Valley, and makai of the present pumping station of the party of the first part in said Waimalu Valley, the same to be located by mutual agreement of the parties hereto, such right of way to be co-terminous with this lease, and said pipe line to be laid underground at such points as may be necessary so as not to interfere with the cultivation of said lands, and so as not to obstruct the existing road leading to lands of the party of the second part in Waimalu Valley, or the existing auwai in said valley leading from Waimalu Stream to lands makai.

2. That this lease and agreement shall supersede and displace all existing leases of lands in Halawa from the party of the second part to the

party of the first part, and no further rent, or claims for any unpaid or back rents, shall hereafter be collectable or claimed from the party of the first part by the party of the second part under any heretofore existing lease or leases, the same being hereby waived by the party of the second part; and also that the party of the second part hereby expressly waives all claims or rents or compensation for use and occupation of any and all lands or any interest therein of the party of the second part heretofore used or occupied by the party of the first part, under disputed ownership or otherwise, particularly including herein a waiver of all claims for rent of, or use and occupation of, the kuleana (two apanas) described in R. P. 457, L. C. A. 2131, in said Halawa, and all costs and expenses of litigation concerning any and all lands situate in said Halawa.

3. That the party of the second part shall at his own cost, not later than December 21st, 1909, construct, and during the term hereof maintain and keep in repair, a stock-proof fence along the upper boundary of said pasture land, along the line of said forest reserve; and at like expense also suitably fence the Waiau and makai boundaries of said pasture lands not later than March first, 1910, and during the term hereof will keep the same in repair. He may remove and utilize the fence now crossing said land at or near the 650 feet contour line for the purpose only of constructing the makai boundary fence of the premises hereby demised to said party of the second part.

Also, during said term, the party of the second part shall not suffer any trespass upon or injury or damage to the lands or crops of the party of the first part, or to the forest reserve mauka of said pasture lands, by any live stock coming or escaping from said pasture lands, and will hold harmless and indemnify the party of the first part from or for any such damage or injury, or from or for any liability to the lessors in said Austin Estate leases, arising from any such trespass or injury, and the said party of the second part will observe and perform all other the terms and conditions and stipulations of the said leases from the said Austin Estate dated respectively September 23, 1906, and May 3rd, 1898, on the part of the lessee to be observed and performed, saving and excepting covenants as to the payment of rents, taxes, duties and assessments.

4. That the party of the first part will release from that certain mortgage and the indebtedness thereby secured, represented by a certain note and mortgage made by Kahele Napuela and others to J. K. Kahookano, Trustee, dated September 14, 1899, recorded in said Registry Office in Liber 196, pages 300-301, for \$300 and interest, the interest of the party of the second part in the land described in R. P. 769, L. C. A. 1996 to Naea, which said mortgage was assigned to the party of the first part by assignment dated November 16, 1899, recorded in Liber 199, page 301.

5. That the party of the first part shall have the right at any time or times to take back and

enter into possession of, any portion or portions of the said pasture lands hereinabove demised to the party of the second part, lying below or makai of the 650 foot contour line, for the cultivation of sugar-cane, and the party of the second part will surrender the same accordingly, the cost of moving the fence to be borne by the party of the first part; and in every case of any such taking of possession there shall be allowed and paid by the party of the first part to the party of the second part by way of rebate or equalization of rental value a sum of money at the rate of thirty cents (30 cents) per acre per annum for the area so taken (payable each year unless the parties shall otherwise agree.) Also, that in case the party of the first part shall lose or shall not obtain or retain the quiet and uninterrupted possession and use of any of the said Halawa lands, or interest in said lands demised by this lease, by reason of the assertion of a paramount title to said lands or said interests therein, there shall be allowed and paid by the party of the second part to the party of the first part a sum at the rate of Fifty Dollars (\$50) per acre per annum (payable annually unless said parties shall otherwise agree) for such lands so lost to said party of the first part, together with any and all loss, damage or injury sustained by said party of the first part to crops or improvements including costs of pipes, ditches and flumes on said lands or interests therein at the time of such dispossession by reason of said loss of or said interruption to the possession of said lands to it hereby demised.

7. That neither party will, without the written consent of the other, assign this lease or any interest in the demised premises except by way of mortgage or deed of trust to secure bonded indebtedness, or underlet the same or any part thereof without such consent.

That each of the parties hereto shall pay the taxes and assessments on the land by it or him demised, but the taxes and assessments on the improvements on the demised premises shall be paid by the party placing said improvements or causing the said improvements to be placed upon the land.

Provided however, that if either of the parties hereto shall fail to perform or observe any of the covenants, terms, or conditions herein contained on its or his part respectively to be performed or observed, after ninety (90) days' written notice to it or him by the other, and the failure or non-observance after said notice still continuing, or shall abandon the said respective premises, either of said parties may at once re-enter the premises by it or him respectively demised, or any part thereof for the whole, and expel the party who has thus failed to observe or perform any of its said covenants, terms or conditions, and those claiming under him or it, or at its or his option terminate the lease of the lands or interests demised by it or him to the other, without service of notice (other than said ninety days' notice) and without service of legal process and without prejudice to any right of action or other proceeding for breach of con-

tract and without liability for any loss or damages arising out of or resulting from such entry or expulsion, and that the party claiming a default and being restored to the possession of the lands by him or it demised will then surrender to the defaulting party the premises by it or him hereby demised, and the respective estates hereby created shall thereupon cease and determine.

It Is Hereby Understood and Agreed that all of the terms, conditions and stipulations hereof shall be binding and obligatory upon the respective parties hereto and their executors, administrators, successors and permitted assigns.

In Witness Whereof the parties hereto have caused these presents to be duly executed the day and year first above written.

HONOLULU PLANTATION
COMPANY,

By /s/ GEO. ROSS,

Its Attorney in-Fact.

/s/ L. L. McCANDLESS.

(Duly Acknowledged.)

HONOLULU PLANTATION EXHIBIT 9-C

(Admitted in Evidence 12-3-46)

This Indenture of Lease made this 28th day of December, 1929, by and between L. L. McCandless, of Honolulu, City and County of Honolulu, Territory of Hawaii, Lessor, and Honolulu Planta-

tion Company, a California corporation doing business in the Territory of Hawaii, Lessee,

Witnesseth:

That the Lessor, in consideration of the rent hereinafter reserved and of the covenants herein contained and on the part of the Lessee to be observed and performed, does hereby demise and lease unto the Lessee all those certain pieces or parcels of land situate at Kalauao in the District of Ewa, City and County of Honolulu, Territory of Hawaii, more particularly described as follows:

1. Land known as Philip Manuel, Plantation Lease No. 274, R. P. 751, L. C. A. 6184 to Ino., \$60.00.

2. Old Lease No. 201, known as Polly Henry Land R. P. 171, to Kuaana, \$180.00.

3. Land known as Kupau, Old Lease No. 124 R. P. 750, L. C. A. 5577 to Kamakahiki, all that portion lying Makai Government Road, \$50.00.

4-a. Old Lease No. 263, R. P. 449, L. C. A. 9400 Apana 2, to Hilo, no Kaoio.

5-b. R. P. 747, L. C. A. 6104 to Mahiai.

6-c. R. P. 2860 L. C. A. 9404 to Nawelo, being the Hakamakalane, portion.

7-d. R. P. 450, L. C. A. 6158 to Pao.

8-e. R. P. 3551 L. C. A. 557 6Apana 3, to Kua-wahie, \$187.68.

To Have and To Hold the same for the full period of fifteen (15) years from the first day of January, 1930, at an annual rental of Four Hun-

dred Seventy-seven and 68/100 Dollars (\$447.68) payable semi-annually, in advance, on the first day of January and the first day of July of each year during the term hereof, without any deduction.

And the Lessor hereby covenants with the Lessee that upon payment by the Lessee of the rent as aforesaid, and upon observance and performance by the Lessee of the covenants hereinafter contained, the Lessee shall peaceably hold and enjoy the said demised premises for the term demised without hindrance or interruption by the Lessor or any person or persons lawfully or equitably claiming by, through or under him.

And the Lessee hereby covenants with the Lessor as follows:

That it, the Lessee, will pay the said rent in United States currency, at the office of the Lessor in Honolulu, in manner aforesaid, without any deduction and without any notice or demand;

That it will also pay all taxes, rates, assessments, impositions, duties, charges and other outgoings of every description to which the said premises or the Lessor or Lessee in respect thereof are now or may during the said term become liable, and whether the same taxes, rates, assessments, impositions, duties, charges and other outgoings are or shall be assessed to or be payable by law by either the Lessor or Lessee;

That it will, at its own expense, during the whole of the said term, make, build, maintain and repair all fences, sewers, drains and roads which may be required by law to be made, built, main-

tained and repaired upon or adjoining or in connection with or for the use of the said premises or any part thereof;

That it will at its own expense from time to time and at all times during the said term well and substantially repair, maintain, amend and keep all buildings and improvements now or hereafter built on the land hereby demised with all necessary reparations and amendments whatsoever;

That it will permit the Lessor and his agents at all seasonable times during the said term to enter the said premises and examine the state of repair and condition thereof and will repair and make good all defects of which notice shall be given by the Lessor or his agents within thirty days after the giving of such notice.

That it will, during the whole of the said term, keep the said premises in a strictly clean and sanitary condition and observe and perform all laws, ordinances, rules and regulations for the time being applicable to said premises and will indemnify the Lessor and his estate and effects against all actions, suits, damages and claims by whomsoever brought or made by reason of the non-observance or non-performance of said laws, ordinances, rules and regulations and of this covenant;

That it will not cut down, fell or injure or suffer to be cut down, felled or injured any trees or saplings now or hereafter growing upon the land hereby demised, except only in the way of good husbandry and for the purpose of clearing the ground necessary for the erection of buildings

and/or the planting of trees or crops of economic value;

That it will not make or suffer any strip or waste or unlawful, improper or offensive use of the said premises, nor, without the consent in writing of the Lessor, mortgage, assign or sublet this lease or any part thereof or any right, title or interest thereunder, and

That at the end of said term or other sooner determination of this lease, the Lessee will peaceably deliver up to the Lessor possession of the land hereby demised, together with all erections or improvements upon or belonging to the same by whomsoever made, in good repair, order and condition.

Provided, However, and this demise is upon this condition, that if the Lessee shall fail to pay the said rent or any part thereof within thirty days after the same becomes due, whether the same shall or shall not have been legally demanded, or shall become bankrupt or shall fail faithfully to observe or perform any of the covenants herein contained and on the part of the Lessee to be observed and performed or shall abandon the said premises, the Lessor may at once re-enter the said premises or any part thereof in the name of the whole or any one of said parcels in the name of all of said parcels, and at his option terminate this lease without service of notice or legal process and without prejudice to any other remedy or right of action for arrears of rent or for any preceding or other breach of contract;

It Is Mutually Agreed by and between the parties hereto that if, at the expiration of the term hereby demised there shall be growing upon the demised premises or any part or parts thereof any crop or crops of cane, whether plant or ratoon, the Lessee shall have the right to retain possession of said premises until the said crop or crops mature and are harvested, paying to the Lessor rent for the said premises or the parts thereof of which possession is retained such proportion of the annual rent hereby reserved as the part or parts thereof so occupied bear to the total acreage of the demised premises, which proportion shall be computed on the percentage basis that the period of time which the said premises or portions thereof may be in the possession of the Lessee bears to 365 days.

And it is hereby expressly agreed and declared that the acceptance of rent by the Lessor shall not be deemed to be a waiver by him of any breach by the Lessee of any covenant herein contained;

That the term "premises" wherever it appears herein includes and shall be deemed or taken to include (except where such meaning would be clearly repugnant to the context) all buildings and improvements now or at any time hereafter built on the said land hereby demised: and that the term "Lessor" in these presents shall include the Lessor, his heirs, executors, administrators and assigns, and also that the term "Lessee" shall include the Lessee, its successors and permitted assigns.

In Witness Whereof the said parties hereto have

executed this instrument, in quadruplicate, the day and year first above written.

/s/ L. L. McCANDLESS,

HONOLULU PLANTATION
COMPANY,

By /s/ R. A. COOKE,

By /s/ HORACE JOHNSON,
Its Attorneys-in-Fact.

(Duly Acknowledged.)

HONOLULU PLANTATION EXHIBIT 9D

(Admitted in Evidence 12-3-46)

This Indenture, made this 5th day of November A. D., 1936, by and between Francis H. I. Brown, of Honolulu, City and County of Honolulu, Territory of Hawaii, hereinafter called the "Lessor", of the first part, and Honolulu Plantation Company, a California corporation, hereinafter called the "Lessee", of the second part:

Witnesseth:

That the Lessor, in consideration of the rent hereinafter reserved, and of the covenants herein contained and on the part of the Lessee to be observed and performed, does hereby demise and lease unto the Lessee, all those certain pieces or parcels of land situate at Waimalu, District of Ewa, said City and County of Honolulu, contain-

ing an aggregate area of 5.624 acres, described as follows:

1. All the land and premises mentioned or described in R. P. 2067 L. C. A. 5649 to Kahanai-puaa, containing an area of 1.81 acres;

2. All the land and premises mentioned or described in R. P. 327 L. C. A. 5586 to Kahiki, containing an area of 0.797 acre;

Save and except a certain portion of this land required by the Territory of Hawaii for the Kamehameha Highway Realignment and designated as Parcel 28, containing an area of 4059 square feet, or 0.093 acre. The net area hereby demised being 0.704 acre;

3. All the land and premises mentioned or described in R. P. 329 L. C. A. 9407-B to Kuaalu, Apana 1 containing 1.473 acre and Apana 2 containing 0.138 acre, or a total area of 1.611 acres.

Save and except certain portions of this land required by the Territory of Hawaii for the Kamehameha Highway Realignment, and designated as follows: Parcel 27, containing 4286 square feet or 0.098 acre out of Apana 1 of this land, and Parcel 26, containing 866 square feet, or 0.02 acre out of Apana 2 of this land, or a total area of 0.118 acre. The net area hereby demised being 1.493 acres.

4. All the land and premises mentioned or described in R. P. 385 L. C. A. 9356, Apana 3, to Kuheuheu containing an area of 1.617 acres.

The foregoing premises were acquired by the Lessor herein from Hong Chack and wife, by deed dated April 26, 1930, recorded in the office of the

Registrar of Conveyances in Honolulu in Book 1061, Page 340.

To Have and To Hold the same together with all rights, privileges and appurtenances to the same belonging or appertaining, unto the Lessee for the term of Five (5) years from October 1, 1936.

Yielding and Paying therefor yearly and every year during the said term unto the Lessor, rental of One Hundred Dollars (\$100.00) per annum, in advance, on the first day of October in each and every year during the continuance of this lease.

And the said Lessor hereby covenants with the said Lessee and its successors and assigns that it shall peaceably hold and enjoy the said premises for the term aforesaid.

And said Lessee, for itself, its successors and assigns, does hereby covenant and agree to and with the said Lessor, his heirs and assigns, that it and its successors and assigns, will pay the said rent in manner aforesaid, that it will pay the taxes on said demised premises, and at the end of said term or any sooner determination of this lease will quietly and peaceably quit and deliver up the land and premises hereby demised to said Lessor or his heirs or assigns.

It Is Mutually Agreed By and Between the Parties hereto that if, at the expiration of the term hereby demised, there shall be growing upon the demised premises or any part or parts thereof any crop or crops of cane, whether plant or ratoon, the Lessee shall have the right to retain possession of said premises until the said crop or crops mature

and are harvested—but for no longer time than a period of six (6) months beyond the termination of this lease on September 30, 1941—paying to the Lessor rent for the said premises or the parts thereof of which possession is retained such proportion of the annual rent hereby reserved as the part or parts thereof so occupied bear to the total acreage of the demised premises, which proportion shall be computed on the percentage basis that the period of time which the said premises or portions thereof may be in the possession of the Lessee bears to 365 days.

In Witness Whereof, the said Lessor has caused this instrument to be executed in quadruplicate on the 5th day of November, 1936, and the said Lessee has likewise caused this instrument to be executed in quadruplicate on the 10th day of November, 1936.

/s/ FRANCIS H. I. BROWN,

HONOLULU PLANTATION
COMPANY,

/s/ R. A. COOKE,
Attorney-in-Fact.

(Corporate Seal.)

(Duly Acknowledged.)

LEASE

Francis H. I. Brown to Honolulu Plantation Company. Term: 5 years from Oct. 1, 1936.

The original of this document recorded as fol-

lows: Territory of Hawaii, office of Bureau of Conveyances. Received for record this 10th day of November A. D., 1936, at 11:40 o'clock A. M., and recorded in Liber 1357 on Pages 474-477, and compared.

/s/ M. N. HUCKSTEIN,
Registrar of Conveyances.

The term of that certain lease given by Francis H. I. Brown, as Lessor, to Honolulu Plantation Company, as Lessee, dated November 5, 1936, duly recorded in the office of the Registrar of Conveyances in Honolulu in Book 1357, Page 474, is hereby extended for the period of Five (5) years from the expiration thereof, namely October 1, 1941, subject to the like rent as therein mentioned, and to all the provisos, covenants and agreements therein contained, and thereto, the undersigned, Lessor and Lessee, mutually bind themselves; it being mutually agreed, however, that the extension of lease hereby granted shall be subject to the Lessor's right to cancel same upon giving ninety (90) days' notice in writing to the Lessee which notice shall be subject to the right of the Lessee to continue to have possession of the said premises for such additional time as may be required to properly mature and harvest the then standing crop of cane.

In Witness Whereof, the said Lessor has caused this instrument to be executed in quadruplicate on the 23rd day of September, 1941, and the said Lessee has likewise caused this instrument to be

executed in quadruplicate on the 23rd day of September, 1941.

/s/ FRANCIS H. I. BROWN,

HONOLULU PLANTATION
COMPANY,

By /s/ L. D. LARSEN,

Its Attorney-in-Fact.

(Corporate Seal.)

(Duly Acknowledged.)

The original of this document recorded as follows: Territory of Hawaii, office of Bureau of Conveyances. Received for record this 25th day of September A. D., 1941, at 10:05 o'clock A. M., and recorded in Liber 1679 on Pages 197-198 and compared. (Signed) M. N. Huckstein, Registrar of Conveyances.

HONOLULU PLANTATION EXHIBIT 9-E

(Admitted in Evidence 12-3-46)

This Indenture, made this 28th day of May, A. D., 1935, by and between Noa W. Aluli, of Honolulu, City and County of Honolulu, Territory of Hawaii, hereinafter called the "Lessor", and Honolulu Plantation Company, a California corporation, hereinafter called the "Lessee"—

Witnesseth:

That the Lessor, for and in consideration of the rents, covenants and conditions hereinafter mentioned and reserved and on the part of the Lessee

to be paid, observed and performed, does hereby demise and lease unto the said Lessee, all the following described parcels of land, containing an aggregate area of 2.161 acres, situate at Kalauao, District of Ewa, City and County of Honolulu, Territory of Hawaii, viz:

1. R. P. 743 L. C. A. 7450-B to Kaika, situate at Kauaopai, said Kalauao, containing an area of 1.08 acres.

2. R. P. 114 L. C. A. 5878 Apana 1 to Kukiiahu, situate at Kaonohi, said Kalauao, containing an area of .626 acre.

3. R. P. 114 L. C. A. 9311 Apana 3 to Kukiiahu, situate at Kaonohi, said Kalauao, containing an area of .455 acre.

To Have and To Hold the same, together with all rights, easements, privileges and appurtenances to the same belonging or appertaining, unto the Lessee for the term of five (5) years from the first day of July, 1935.

Yielding and Paying therefore unto the said Lessor an annual rental of Thirty-two and $\frac{41}{100}$ Dollars (\$32.41), payable annually in advance, on the 1st day of July in each and every year during the term of this lease.

And the said Lessor hereby covenants with the said Lessee and its successors and assigns that it shall peaceably hold and enjoy the said premises for the term aforesaid.

And said Lessee, for itself, its successors and assigns does hereby covenant and agree to and with the said Lessor, his heirs and assigns, that it and

its successors and assigns will pay the said rent in manner aforesaid, that it will pay the taxes on said demised premises, and at the end of said term or any sooner determination of this lease will quietly and peaceably quit and deliver up the land and premises hereby demised to said Lessor or his heirs or assigns.

It Is Mutually Agreed by and between the parties hereto that if at the expiration of the term hereby demised there shall be growing upon the demised premises or any part or parts thereof any crop or crops of cane, whether plant or ratoon, the Lessee shall have the right to retain possession of said premises until the said crop or crops mature and are harvested, paying to the Lessor rent for the said premises or the parts thereof of which possession is retained such proportion of the annual rent hereby reserved as the part or parts thereof so occupied bear to the total acreage of the demised premises, which proportion shall be computed on the percentage basis that the period of time which the said premises or portions thereof may be in the possession of the Lessee bears to 365 days.

Provided, Always, and these presents are upon this condition, that in case of a breach of any of the covenants to be observed on the part of the Lessee, said Lessor may, while the default or neglect continues, without any notice or demand, enter upon the premises and thereby determine the estate hereby created; and may thereupon expel and remove, forcibly if necessary, the said Lessee and

those claiming under it, and their effects; and the acceptance of rent by said Lessor shall in no wise be or be construed to be a waiver of any breach of any of the covenants and conditions herein set forth.

In Witness Whereof, the said Lessor has hereunto and to three other instruments of like date and tenor set his hand and seal, and the said Lessee has likewise set its name by its duly appointed attorney-in-fact, under power-of-attorney dated January 10, 1935, on the day and year first above written.

(Seal) /s/ NOA W. ALULI,

HONOLULU PLANTATION
COMPANY,

By /s/ P. E. SPALDING.

Its Attorney-in-Fact.

(Duly Acknowledged.)

The term of that certain unrecorded lease given by Noa W. Aluli, as Lessor, to Honolulu Plantation Company, as Lessee, dated May 28, 1935, is hereby extended for the period of Three (3) years and Six (6) months from the expiration thereof, namely—July 1, 1940, subject to the like rent as therein mentioned, and to all the provisos, covenants and agreements therein contained, and thereto, the undersigned mutually bind ourselves.

In Witness Whereof, the Trustees under that certain Deed of Trust given by said Lessor dated October 30, 1933, recorded in Book 1395 Page 45,

have caused this instrument to be executed in quadruplicate on the 25th day of August, 1939, and the said Lessee has likewise caused this instrument to be executed in quadruplicate on the 26th day of August, 1939.

/s/ AIMA N. ALULI,

/s/ AUWAE L. ALULI,

/s/ NOA T. ALULI,

Trustees of Noa W. Aluli
Estate.

HONOLULU PLANTATION
COMPANY,

By /s/ R. A. COOKE,

Its Attorney-in-Fact.

(Corporate Seal.)

(Duly Acknowledged.)

The term of that certain unrecorded lease given by Noa W. Aluli, as Lessor, to Honolulu Plantation Company, as Lessee, dated May 28, 1935, the term of which was extended for a period of Three (3) years and Six (6) months from July 1, 1940, by unrecorded instrument dated August 25, 1941, is hereby further extended for a term of Five (5) years from January 1, 1944, subject to the like rent as therein mentioned, and to all the provisos, covenants and agreements therein contained, and thereto, the undersigned mutually bind ourselves.

In Witness Whereof, the Trustees under that certain Deed of Trust given by said Lessor dated October 30, 1933, recorded in Book 1395 Page 45,

have caused this instrument to be executed in quadruplicate on the 9th day of May, 1942, and the said Lessee has likewise caused this instrument to be executed in quadruplicate on the 26th day of May, 1942.

/s/ AIMA N. ALULI,

/s/ AUWAE L. ALULI,

/s/ NOA T. ALULI,

Trustees of Noa W. Aluli Estate.

HONOLULU PLANTATION
COMPANY.

By s/ P. E. SPALDING,

Its Attorney-in-Fact.

(Corporate Seal.)

(Duly Acknowledged.)

HONOLULU PLANTATION EXHIBIT 9-F

(Admitted in Evidence 12-3-46)

Liber 1627, Page 467.

This Indenture of Sublease made this 17th day of January, A. D., 1941, by and between Oahu Sugar Company, Limited, an Hawaiian corporation, hereinafter called the "Lessor", of the first part and Honolulu Plantation Company, a California corporation, hereinafter called the "Lessee" of the second part,

Witnesseth:

That the Lessor, in consideration of the rent hereinafter reserved and of the covenants herein

contained and on the part of the Lessee to be observed and performed, does hereby demise and sublease unto the Lessee, all that certain tract of land situated in the valley of Waiawa, District of Ewa, City and County of Honolulu, Territory of Hawaii, being a portion of the Ahupuaa of Waiawa as described in R. P. 4475 L. C. A. 7713, Apana 46, to V. Kamamalu, at present under lease to Oahu Sugar Company, Limited, from the Trustees of the B. P. Bishop Estate, Lease No. 6500, as recorded in the office of the Registrar of Conveyances in Honolulu in Book 1599 Page 208. Said parcel of land is generally described as follows:

Commencing at the Southerly corner of this tract of land on the Easterly side of the Waiawa stream, which point is about 300 feet Northerly of Kamehameha Highway; thence running Westerly and Northerly along the Easterly side of the Waiawa stream to a point 2400 feet, more or less, above Pump No. 6; thence crossing said stream in a Northeasterly direction along the Westerly side wall of Waiawa Valley to the Easterly side of said Waiawa stream; thence following the Easterly side of Waiawa stream to its intersection with Waimano stream; thence following the Easterly side of Waimano stream to the boundary line of the land of Manana; thence in a Southerly direction along the boundary line of the land of Manana to a ridge road; thence in a Southwesterly and Southeasterly direction along said ridge road to a point about 1250 feet above Kamehameha Highway; thence in a Southerly direction down a gulch

side and thence along said gulch side to a point about 550 feet above Kamehameha Highway; thence in a Southwesterly direction to the Easterly side of Waiawa stream, being the point of beginning, containing a net area of 167.20 acres, classified as follows:

(a) Cane land now under cultivation, 24.99 acres.

(b) Miscellaneous land (old fallow cane land), 21.11 acres.

(c) Miscellaneous land (pineapples and vegetables), 24.47 acres.

(d) Stream, waste and pali, 96.13 acres.

(e) Reservoir, 0.50 acres.

The land hereby demised being more particularly identified on a map thereof hereto attached and made a part hereof.

Being a portion of the premises demised by the Trustees of the Estate of Bernice P. Bishop to said Lessor by their Lease No. 6500, dated July 1, 1940, duly recorded in the office of the Registrar of Conveyances in Honolulu in Book 1599 Page 208.

Reserving to said Lessor a certain area designated on said plan hereto attached as "Boy Scout Camp" of an area of 2.80 acres, more or less, together with an easement right-of-way thereto from the road passing Oahu Sugar Company, Limited, Pump No. 6, as may hereafter be mutually agreed upon.

Also reserving and excepting from this demise the right to prospect, dig, bore, drill and tunnel for water on the said demised premises.

To Have and To Hold the same, together with all

rights, easements, privileges and appurtenances to the same belonging or appertaining, except as aforesaid, unto the Lessee from the first day of January, 1941, for the term of Twenty-four (24) years and Six (6) months thence next ensuing, the Lessee Yielding and Paying therefor unto the Lessor the annual rental of One Thousand and Seventy-five Dollars (\$1,075.00), semi-annually, in advance, on the first day of January and the first day of July in each and every year during said term, without any deduction and without any notice or demand.

And the Lessor hereby covenants with the Lessee that upon payment by the Lessee of the rent as aforesaid and upon observance and performance of the covenants by the Lessee hereinafter contained, the Lessee shall peaceably hold and enjoy the said demised premises for the term hereby demised, without hindrance or interruption by the Lessor or any other person or persons lawfully or equitably claiming by, through or under it.

And the Lessee hereby covenants with the Lessor as follows:

That it (the Lessee) will pay the said rent in legal currency of the United States to said Lessor at the office of its Agent, American Factors, Ltd., in Honolulu, in manner aforesaid, without any deduction and without any notice or demand.

That it will also pay all taxes, rates, assessments, impositions, duties, charges and other outgoings of every description to which said premises, or the Lessor or Lessee in respect thereof, are now or may during the said term become liable, and

whether the same taxes, rates, assessments, impositions, duties, charges and other outgoings are or shall be assessed to or be payable by law by either the Lessor or Lessee;

That it will, out of its own moneys during the whole of said term, make, build, maintain and repair all fences which may be required by law to be made, built, maintained and repaired upon, adjoining or in connection with or for the use of the said premises or any part thereof;

That it will, during the whole of the said term, keep the said premises in a strictly clean and sanitary condition and observe and perform all of the rules and regulations of the Health Authorities for the time being applicable to the said premises and will indemnify the Lessor and its estate and effects against all actions, suits, damages and claims by whomsoever brought or made by reason of the non-observance or non-performance of the said rules and regulations or of this covenant;

That it will permit the Lessor or its agents, at all seasonable times during the said term, to enter the said premises and examine the state of repair and condition thereof and will repair and make good all defects of which notice shall be given by the Lessor, or its agents, within thirty (30) days after the giving of such notice;

That it will whenever requested by the Lessor so to do, deliver up to the Lessor peaceable possession of such portion or portions of the land hereinbefore described which now is, or are, or hereafter during the continuance of the term hereof may be required or condemned for street or road widening or other-

wise for street or road purposes, without indemnity or reduction of rent;

That it will not make or suffer any strip or waste or unlawful, improper or offensive use of the said premises, or any part thereof, nor, without the consent in writing of the Lessor, assign this lease or sublet or part with the possession of the whole or any part of the said demised premises or make or suffer any alteration of any buildings, now or at any time hereafter built on the said land hereby demised;

That at the end of said term or other sooner determination of this lease the Lessee will peaceably deliver up to the Lessor possession of the land hereby demised, together with all erections and improvements upon or belonging to the same by whomsoever made in good repair, order and condition;

That it will perform and observe the covenants and agreements on the part of the Lessee set forth in that certain indenture of lease between the Trustees of the B. P. Bishop Estate, as lessors, and Oahu Sugar Company, Limited, as lessee, dated July 1, 1940, recorded as aforesaid in Book 1599 Page 208 excepting the covenants for the payment of rent reserved thereby and the delivery of all erections and improvements upon the said premises at the expiration of this tenancy, and to keep the Lessor indemnified against all claims, damages, costs and expenses in respect of the non-performance or non-observance thereof;

Provided, However, and this demise is upon this condition, that if the Lessee shall fail to pay the

said rent or any part thereof within thirty days after the same becomes due, whether the same shall or shall not have been legally demanded, or shall become bankrupt, or shall fail faithfully to observe or perform any of the covenants herein contained and on its part to be observed and performed, or shall abandon the said premises, the Lessor may at once re-enter said premises or any part thereof in the name of the whole and at its option terminate this lease without service of notice or legal process and without prejudice to any other remedy or right of action for arrears of rent or for any preceding or other breach of contract; or if at any **time** or times during the said term the Government of the United States of America or of the Territory of Hawaii or any county, municipality or other subdivision of the Territory of Hawaii, or any public service company, shall condemn the said premises, or any part or parts thereof, for any public use or otherwise (except such part or parts be for roads or streets or road or street purposes), then, and in every such case, the estate and interest of the Lessee, in the said premises and in the lease herein made shall at once cease and determine, and the Lessee shall not by reason of such condemnation be entitled to any claim either against the Lessor or others for compensation or indemnity and all compensation payable or to be paid for or on account of the said premises by reason of the condemnation as aforesaid, shall be payable to and be the sole property of the Lessor and the Lessee shall have no interest in

or claim to such compensation or any part or parts thereof whatsoever;

And it is hereby expressly agreed and declared that the acceptance of rent by the Lessor shall not be deemed to be a waiver by it of any breach by the Lessee of any covenant herein contained; that the term "premises" wherever it appears herein includes and shall be deemed or taken to include (except where such meaning would be clearly repugnant to the context) all buildings and improvements now or at any time hereafter built on the said land hereby demised, and that the term "Lessor" in these presents shall include the Lessor, its successors and assigns, and also that the term "Lessee" shall include the Lessee, its successors and permitted assigns.

In Witness Whereof, the said Lessor has caused this instrument to be executed in quintuplicate on the 17th day of January, A. D. 1941, and the said Lessee has likewise caused this instrument to be executed in quintuplicate on the 20th day of January, 1941.

(Seal)

OAHU SUGAR COMPANY,
LIMITED,

By /s/ H. A. WALKER,
President.

By /s/ S. M. LOWERY,
Treasurer.

(Seal)

HONOLULU PLANTATION
COMPANY,

By /s/ R. A. COOKE,
Its Attorney-in-Fact.

(Duly Acknowledged.)

Entered of Record this 25th day of February,
A. D. 1941 at 8:29 o'clock A. M., and compared.
Mark N. Huckestein, Registrar of Conveyances.

/s/ (Illegible.)

Clerk.

Bureau of Conveyances

Territory of Hawaii

Honolulu, Hawaii, October 9, 1946

The foregoing is a true photostatic copy of the
record, recorded in the Bureau of Conveyances of
the Territory of Hawaii, in liber 1627 on pages
467-473.

(Seal) /s/ OLIVER R. AIU,

Deputy Registrar of Conveyances for the Terri-
tory of Hawaii.

HONOLULU PLANTATION EXHIBIT 9-H

(Admitted in Evidence 12-3-46)

Office of the
Assistant Registrar, Land Court
Territory of Hawaii

(Bureau of Conveyances)

Honolulu, Hawaii, Mar. 12, 1943

The attached instrument is a true copy of Document Number 66821, received for registration in this office, Mar. 12, 1943, at 2:07 o'clock p.m., and noted on Certificates of Title Numbers 11386, 13831, 13832 and 13688.

Attest:—

(Seal) /s/ OLIVER R. AIU,
Assistant Registrar, Land Court, Territory of
Hawaii.

LEASE

This Indenture, made this 15th day of December, 1941, by and between Edith Austin, unmarried, of Marion, Massachusetts, Mabel Frazar Austin, of Dedham, Massachusetts, Lindsley Austin, of the City and County of Honolulu, Territory of Hawaii, Dorothy Bradstreet Austin, unmarried, of said Dedham, Massachusetts, and John Frazar Austin, of said Dedham, Massachusetts, individually, and Mabel Frazar Austin, of said Dedham, Massachusetts, Lindsley Austin, of said City and County of Honolulu, and the Boston Safe Deposit

& Trust Company, of Boston, Massachusetts, as Trustees under the Will and of the estate of Walter Austin, deceased, hereinafter called the "Lessors" of the first part, and Honolulu Plantation Company, a California corporation carrying on business in the Territory of Hawaii, whose post-office address is care C. Brewer and Company, Limited, P. O. Box 3470, Honolulu, T. H., hereinafter called the "Lessee" of the second part,

Witnesseth: That the Lessors, in consideration of the rent hereinafter reserved and of the covenants herein contained and on the part of the Lessee to be observed and performed, and the surrender by the Lessee as of December 31, 1940 and the cancellation effective as of December 31, 1940 of the two existing leases dated March 27, 1936 and June 12, 1937, filed in the office of the Assistant Registrar of the Land Court as Documents Nos. 42080 and 42081 and noted on Certificate of Title Nos. 13832, 13688, 13831 and 11386, do hereby demise and lease unto the Lessee:

All those certain parcels of land situate at Waimalu, District of Ewa, City and County of Honolulu, Territory of Hawaii, described as follows:

First: Lot 1, area 2869.73 acres, and Lot 5, area 2.4 acres, as shown on Map 1, and Lots 4-B-1, area 29.135 acres, 4-B-2, area 0.789 acre, and 4-B-4, area 20.46 acres, of the Subdivision of Lot 4-B as shown on Map 3, said maps being filed in the Office of the Assistant Registrar of the Land Court of the Territory of Hawaii with Land Court Application No. 950 (amended); Together with a full,

free and perpetual easement or right of passage way, either on foot or with horses, cattle, carts, wagons and other vehicles however propelled over the following described piece of land:

Beginning at the Southwest corner of this piece of land, being also the initial point of Lot 5 as above described, and running by true azimuths:

1. $176^{\circ} 09' 40.0$ feet;
2. $266^{\circ} 09' 20.0$ feet;
3. $356^{\circ} 09' 40.0$ feet;
4. $86^{\circ} 09' 20.0$ feet to the point of beginning and containing an area of 800 square feet;

Being all of the lands, except Lot 4-B-3 of said Subdivision of Lot 4-B described in Transfer Certificates of Title Nos. 13,688 issued to Edith Austin, and 13,832 issued to Mabel Frazar Austin and Lindsley Austin, and Boston Safe Deposit and Trust Company, as Trustees under the Will and of the Estate of Walter Austin, Deceased;

Second: R.P. 326, L.C.Aw. 4406-B to Apaa, containing an area of 2.586 acres, being a portion of Land Court Application No. 1027 and being all the lands described in Transfer Certificates of Title Nos. 11386 issued to Edith Austin and 13831 issued to Mabel Frazer Austin and Lindsley Austin, and Boston Safe Deposit and Trust Company, as Trustees under the Will and of the Estate of Walter Austin, Deceased.

Classification of net area demised:

Cane lands and areas contributory thereto			
	Cane (Acres)	Contributory (Acres)	Total (Acres)
Mauka of Gov't. Rd.	513.29	33.78	547.07
Makai of Gov't. Rd.	27.55	0.38	27.93
	<hr/>	<hr/>	<hr/>
Totals	540.84	34.16	575.00
	Forest Reser- vation Lands (Acres)	Misc. & Waste Lands (Acres)	Total Area (Acres)
Mauka of Gov't. Rd.	1295.00	1027.66	2869.73
Makai of Gov't. Rd.	.....	27.44	55.37
	<hr/>	<hr/>	<hr/>
Totals	1295.00	1055.10	2925.10

Together with all the buildings and improvements thereon, excepting and always reserving out of this demise:

(a) All such pole and wire lines of The Hawaiian Electric Company, Limited, as shall, at the commencement of the term of this lease, have been constructed over and across portions of the lands hereby demised, together with all rights appurtenant thereto;

(b) All lands which the Lessors may from time to time during the term hereof require or deem necessary or desirable as rights of way for pole and wire lines of all kinds to be constructed and maintained by them or their assigns (either in addition to or in substitution for any existing pole and wire line) upon, over or across the lands hereby demised from any point or points and in any direction, and also all reasonable right of entry upon the demised premises for the construction, repair and maintenance of the same in efficient use and condition;

it being understood and agreed that the Lessor's rights in this respect shall be exercised in such manner as to occasion the Lessee the least possible interference with the use by the Lessee of the land demised;

(c) The right unto the Lessors and their tenants and lessees of adjoining and neighboring lands reasonably to use, in common with the Lessee, such roads and trails as may exist upon the lands hereby demised;

To have and to hold the same unto the Lessee from the 1st day of January, 1941, for the term of twenty-five (25) years thence next ensuing, the Lessee yielding and paying therefor yearly and every year during said term unto the Lessors, rent as follows:

A. Minimum Rental:

The minimum rent for the lands hereby demised, based on Fifteen Dollars (\$15.00) per acre per annum for "Cane Lands"; Five Dollars (\$5.00) per acre per annum for "Contributory Lands"; and none for "Miscellaneous and Waste Lands" and "Forest Reservation Lands", shall be Eight Thousand Two Hundred Eighty-three and 40/100 Dollars, (\$8,283.40) per annum, and shall be payable in two equal payments of \$4,141.70 each in advance on the first day of January and the first day of July in each and every year during the continuance of this lease, without any deduction. Said minimum rent shall be decreased for the remainder of the term at the rate of Fifteen Dollars (\$15.00) per acre per annum for each acre of "Cane Lands",

and at the rate of Five Dollars (\$5.00) per acre per annum for each acre of "Contributory Lands", which may be required, taken or condemned for road or other public purposes, and the Lessors shall refund to the Lessee the unearned portion, if any, of the semi-annual installment of the rent which shall have been paid in advance.

B. Percentage Rental:

The percentage rent for each calendar year of the term of this lease for the lands hereby demised shall be determined by ascertaining the sum, in cash, of the following:

1. Five per centum (5%) of the gross amount of ninety-six degree (96°) centrifugal raw sugar or its equivalent produced during each calendar year from cane grown on the lands hereby demised, valued at the full per ton New York market price, Hawaiian basis, for ninety-six degrees (96°) centrifugal raw sugar (at present officially reported from time to time by the Hawaiian Sugar Planters' Association, and in case such official reports are discontinued, such other base price as may be mutually agreed upon or as may be determined by means of arbitration as is hereafter provided) averaged for each day, including Sundays and holidays, for the period of each such calendar year, without any deduction, to which shall be added the per ton value of any bounties, compliance payments or refunds received during any calendar year by the Lessee on account of sugar produced from the demised lands during each calendar year.

2. Five per centum (5%) of the gross proceeds,

without any deduction, received by the Lessee from the sale of each form of by-product of sugar or sugar cane produced during the term of this lease by the Lessee from cane grown on the lands hereby demised during each calendar year;

3. Five per centum (5%) of the gross proceeds, without any deduction, received by the Lessee from the sale of products and by-products of any kind, other than of sugar or sugar cane, produced or derived from the lands hereby demised during each calendar year;

The amount, if any, of the percentage rent payable for any calendar year for the lands hereby demised shall be the amount by which the percentage rent for such calendar year exceeds the minimum rent for the lands hereby demised for such calendar year, and such amounts shall be paid by the Lessee to the Lessors within thirty days after the end of such calendar year, or in the event that any bounties, compliance payments or refunds are due to be paid the Lessee on account of sugar produced by the Lessee during such calendar year then the percentage rent with respect to such bounties, compliance payments or refunds, if any, shall become due and payable 30 days after the receipt of such bounty, compliance payment or refund.

C. Rental on Account of Sublease:

In the event any portions of the lands classified as 'Cane Lands' shall be sublet by the Lessee, the Lessee shall yield and pay unto the Lessors a further and additional rent amounting to one-half ($\frac{1}{2}$) of the excess of the rent reserved under any

such sublease over a rate of \$15.00 per acre per annum for each acre so sublet; in the event that any portion of the lands classified as 'Contributory Areas' shall be sublet by the Lessee, the Lessee shall yield and pay unto the Lessors a further and additional rent amounting to one-half ($\frac{1}{2}$) of the excess of the rent reserved under any such sublease over a rate of \$5.00 per acre per annum for each acre so sublet; and in the event that any portion of the 'Miscellaneous and Waste Lands' shall be sublet by the Lessee, the Lessee shall yield and pay unto the Lessors a further and additional rent of one-half ($\frac{1}{2}$) of the rent reserved under any such sublease.

Such further and additional rent payable on account of any such sublease shall begin as of the date of commencement of such sublease and shall be paid by the Lessee to the Lessors without any deduction, semi-annually in advance, in equal installments during the term of such sublease, the first of such payments to be made on the first day of January or the first day of July, as the case may be, next succeeding the date of commencement of such sublease, and shall include any rent accrued on account of such sublease at the date of such first payment.

And the lessors hereby covenant with the Lessee that, upon payment by the Lessee of the rent as aforesaid and upon observance and performance of the covenants by the Lessee herein contained and the surrender and cancellation of the leases held by the Lessee as hereinabove mentioned, the Lessee

shall peaceably hold and enjoy the demised premises for the said term without hindrance or interruption by the Lessors or any other person or persons whomsoever, and without limitation upon the general right, hereby granted, to use the lands herein demised for any purpose not herein specifically reserved, restricted or denied, the Lessee shall have the right upon all lands hereby demised, including Forest Reservation Lands, to prospect, dig, bore, drill and tunnel for water, and to build dams, and to construct pumping stations, and to dig, excavate and otherwise construct reservoirs thereon for the storage of water, and to dig, lay, bore and construct ditches, pipe lines, water courses, tunnels and flumes thereon for conducting or leading water to the dams and reservoirs, and from the tunnels, dams, pumping stations and reservoirs to the agricultural lands demised hereby, or to any lands adjacent thereto, and to use any and all water thereby developed for any or all useful purposes in connection with the operation of the Lessee's business, including the irrigation of sugar cane or other crops, the development of power, the watering of livestock, the supplying of domestic water, and the sale thereof to others, provided that in the event water is developed above the eight hundred foot contour line the Lessee shall so use such water as to give preference to the lands hereby demised to the extent such new water development results in the use of additional lands for the growing of sugar cane, and in the event any water developed on the premises hereby demised as hereinbefore provided

is sold for use not related to the demised premises, the Lessee shall pay rent for such water in an amount fixed by mutual agreement, or failing such mutual agreement, then by arbitration as hereinafter provided.

And the Lessee hereby covenants with the Lessors as follows:

That it (the Lessee) will pay the said rent in lawful currency of the United States at the office of the Lessors in Honolulu, in manner aforesaid, without any notice or demand;

That it will also pay, when and as the same become due and payable, all taxes, rates, assessments, impositions, duties, charges and other outgoings of every description to which the demised premises or the Lessors or Lessee in respect thereof are on January 1, 1941, or may during the said term become liable, and whether the same taxes, rates, assessments, impositions, duties, charges and other outgoing are or shall be assessed to or be payable or dischargeable by law by either the Lessors or Lessee, including all assessments or charges for any permanent benefit or improvement of the premises hereby demised or any part thereof, made under any betterment law or otherwise, or any assessments or charges for sewerage or street or sidewalk improvements or municipal or other charges which may be legally imposed upon the said premises, or to which the said premises or any part thereof or the Lessors or Lessee in respect thereof are on January 1, 1941, or may during the said term become liable; provided, however, that

in case any such repair, construction or improvement or any public improvement, whether made by the Lessee hereunder by requirement of law or made by any governmental agency or others under authority of law, shall be made partly for the benefit of lands of the Lessors other than the demised premises then subject to the provisions of this lease, or in case the life of any such repair, construction or improvement made, built or constructed (whether the cost thereof shall be payable under any betterment law or otherwise) may reasonably be expected to exist beyond the term of this lease, the cost thereof or the assessments therefor shall be apportioned between the Lessors and the Lessee in proportion to their respective interests by mutual agreement, or, failing such agreement, then by arbitration as hereinafter provided; and provided further that if any of said assessments or charges may be payable either in a lump sum or in annual installments the Lessee may elect to pay such assessments and charges in annual installments and shall only be liable for the annual installments falling due during the term of this demise, and in case any such repair, construction or improvement shall be for the sole benefit of lands of the Lessors or of the occupants thereof, other than the demised premises then subject to the provisions of this lease, the Lessee shall not be required to pay any portion of the cost thereof;

That it will, at its own expense during the whole of said term, make, build, maintain and repair all fences, sewers, drains and roads which may be re-

quired by law to be made, built, maintained and repaired upon of in connection with or for the use of said premises or any part thereof; and will also build all fences which, in the judgment of the Lessors, may be necessary to protect the reversion in any manner and such also as may be necessary to prevent cattle, horses and other grazing animals from straying from the lands hereby demised onto adjoining lands not controlled by the Lessee;

That it will at its own expense during the whole of said term well and substantially repair, maintain, mend and keep all buildings, reservoirs, dams, ditches, tunnels, flumes, water courses, wells and other improvements and also all boundary monuments now or hereafter built, made or constructed on the lands hereby demised and all necessary reparations and amendments whatsoever in good order and condition, and will also, at its own expense, during the whole of said term, rebuild any and all buildings that may be destroyed by fire within a reasonable time after such destruction: provided, however, that such improvements and buildings as it is mutually agreed by and between the Lessors and the Lessee are of no value whatsoever to the interest of either the Lessors or the Lessee and such buildings and improvements as are damaged by Act of God and the public enemy shall be excepted from the operation of the covenant contained in this paragraph:

That it will permit the Lessors and their agents, at all seasonable times during said term, to enter the demised premises and examine the state of re-

pair and condition thereof, and will repair and make good all defects to the extent herein covenanted of which notice shall have been given by the Lessors or their agents with prompt expedition after the receipt of such notice;

That it will during the whole of said term keep the demised premises in a strictly clean and sanitary condition and observe and perform all the laws, ordinances, rules and regulations relating to health and sanitation for the time being applicable in the premises, and will indemnify the Lessors against all actions, suits, damages and claims by whomsoever brought or made by reason of the non-observance or non-performance of such laws, ordinances, rules and regulations or of this covenant;

That it will plant and complete prior to January 1, 1946, a barrier forest zone of a width to be determined by mutual agreement and varying with the terrain, using trees and methods of planting satisfactory to the Lessors, within and along the makai boundary of the forest reservation and will thereafter care for the trees, and, where necessary to secure a full stand, will replant where trees shall die or be destroyed; and will not cut down, fell or injure or suffer to be cut down, felled or injured, such trees within the aforesaid barrier zone except in making improvement thinnings;

That it will not use the Forest Reservation lands herein demised for any other purpose than as forest reservation without first obtaining the written approval of the Lessors;

That it will at all times during said term admin-

ister the Forest Reservation Lands in cooperation with the forestry authorities of the Territory of Hawaii for the time being, according to the improved methods adapted to a water conserving forest;

That it will at all times during said term foster and encourage the natural reforestation of the Forest Reservation Lands herein demised, and in prosecuting any work of developing any water thereon or diverting water therefrom will take all reasonable and needful precautions to prevent any injury to the natural or planted forest growth;

That it will at all times during said term take all reasonable precautions to keep cattle, horses and other grazing animals out of the Forest Reservation Lands and to prevent forest fires occurring thereon, and in the case such fires shall occur will use all reasonable means at its command or under its control in having such fires speedily extinguished;

That, whenever requested by the Lessors so to do the Lessee will, within six months from the date of such request, at its own charge and expense make and thereafter maintain during the whole of said term such fencing as may be necessary to protect the Forest Reservation Lands hereby demised from the intrusion of cattle, horses and other grazing animals;

That it will from time to time and at least once each year during the said term, make a careful inspection of the Forest Reservation Lands hereby demised, and will during the month of January in

each year (beginning 1942) submit to the Lessors a written report (in duplicate) of the results of such inspection, stating whether or not any animals detrimental to the forest cover or forest lands, or evidence thereof, or any damage to or improper use of said forest cover or forest lands, were observed, and reporting on the general condition of the forest cover and the state of repair and condition of any fences erected for the protection of the Forest Reservation Lands;

That it will, in connection with any water investigation, development, construction, extension and operation on the demised lands hereinabove authorized, furnish to the Lessors from time to time, and not less frequently than once each year during the term of this lease, a full and complete written report (in duplicate) of all work done, together with copies of all reports, surveys, maps, plans and other records secured in connection with such work; and will also keep, in a manner satisfactory to the Lessors, complete records of the quantity of water developed, if any, and will furnish copies of such records to the Lessors not less frequently than once in each year of the term of this lease, and will, in the event that the Lessee shall develop water on lands not herein demised in such manner that the flow of water therefrom becomes mixed with the water developed on the demised lands, install, maintain, and operate adequate water-measuring equipment and will make, keep and furnish the Lessors sufficient guagings and records accurately to determine the quantity of water developed on the lands hereby demised;

That it will also, as soon as is reasonably practicable after the end of each calendar year during the term of this lease, furnish the Lessors a full and complete written report (in duplicate) which will show (1) the acreage of cane harvested during such year on the demised premises segregated as to cane fields, specifying the respective tonnages of cane and raw sugar, and crop cycles and age of cane in months at time of harvest, for each of such fields, together with a list of areas by fields planned to be harvested during the following calendar year; (2) the total tonnage of raw sugar produced during such preceding calendar year by the Lessee from cane grown on all lands controlled by the Lessee; and (3) the quantities of each form of by-product of sugar or sugar-cane produced during such calendar year by the Lessee from cane grown on the demised premises, together with the quantities sold, amounts of gross proceeds received, the year during which such by-products were produced and the quantities remaining unsold at the close of such year;

That it will also, as soon as is reasonably practicable after the end of each calendar year during the term of this lease, furnish the Lessors a full and complete written report (in duplicate) which shall show the quantities of each form of product and by-product, other than sugar and by-products of sugar or sugar cane, produced on the demised premises during such calendar year, and which were sold during such calendar year, together with the amount of gross proceeds received from the sale of each such other product or by-product;

That in the event that any part or parts of the demised premises shall at any time or times during the term of this lease be sublet by the Lessee to others, the Lessee will, as soon as is reasonably practicable after the end of each calendar year during the continuance of any such sublease, furnish the Lessors with a full and complete written report (in duplicate) which shall show the name of the sub-Lessee, the location and area of each parcel of land so sublet, together with the term and rent reserved;

That the Lessee will at all times during the usual office hours, permit the Lessors or their authorized agents and employees to have free access to all of its books of account, contracts and papers relative to the business carried on by it on or in connection with the premises hereby demised in so far as such books of account, contracts and papers shall pertain directly to the determination of the amount of gross proceeds hereinabove mentioned and to examine the same and make copies thereof or any part thereof, and generally to take and use such reasonable means as the Lessors shall deem fit for ascertaining that the accounts furnished by the Lessee are full and accurate and that the Lessee is otherwise faithfully carrying out the covenants herein contained and on its part to be observed and performed; and that it will furnish the Lessors henceforth with copies of the detailed annual reports for each year which are submitted by the Lessee to its stockholders;

That it will not make or suffer any strip or waste

or unlawful, improper or offensive use of the premises demised herein nor, without the consent in writing of the Lessors, mortgage nor assign this lease nor sublet nor part with the possession of the whole or any part of the said demised premises; provided that the restriction as to subleasing shall not apply to lands not being used by the Lessee for the growing of sugar cane and which are not subleased for terms in excess of five years;

That in the use of the demised premises for the planting and cultivating of sugar cane, the Lessee will follow such use in accordance with the standards of good husbandry and approved practices then prevailing in the sugar industry in the Territory of Hawaii, and in the use of the demised premises for any other purpose whatsoever, the Lessee will follow the best of generally approved methods, and in pursuance of these provisions and in the exercise of such use the Lessee shall, by proper construction and use of drainage ditches and otherwise, take all reasonable precautions to prevent or arrest loss of soil by erosion, to the end that the rent payable under this lease shall be as large as might reasonably be expected; and will continue to do so during the continuance of this lease, with all reasonable skill, care, prudence and diligence, so long as it can be done with reasonable profit to the Lessee, it being understood, however, that in no event except as hereinbefore provided, shall this covenant be construed to diminish the minimum rent as hereinbefore specified. In the event any of the lands hereby demised are sublet, pursuant to the provisions of this lease, the sub-

lessee shall be required to covenant that it will not do any planting or cultivating on excessive slopes and will do all furrowing on contours except where permitted by the sublessor to deviate therefrom and subject to the sublessor determining in its discretion what is to be considered an excessive slope, and that in plowing, tilling, planting and cultivating the premises so demised and in harvesting crops therefrom and in the treatment of the said premises after harvesting the sublessee will conform in all respects to the practices of good husbandry;

That it will cultivate and maintain in sugar cane for the said term not less than four hundred eighty-nine (489) acres of the land hereby demised classified as "Cane Lands and Areas Contributory Thereto" below the approximate 650 foot contour line, and that the Lessee shall only be required to keep said area in sugar cane when not prevented therefrom by the Lessors or those holding under them, extreme labor shortage, labor strikes, ouster by paramount authority, Act of God, the public enemy, any government or association of growers restriction or curtailment program to which the Lessee may be a party, and when not in conflict with any other provision of this lease.

That, in the event the Lessee discontinues or temporarily curtails cane cultivation on land controlled by it, due to Governmental restrictions or in order that the Lessee may receive benefits from any general crop reduction program initiated by the Government or by an association of growers,

it will not discontinue nor temporarily curtail the cultivation of cane on the demised premises in a greater ratio to the required total curtailment than the ratio of cane area cultivated on the demised premises bears to the total cane area cultivated by the Lessee;

That, in the event the Lessors shall bring and sustain any action against the Lessee for any breach of covenant or condition herein contained or for the recovery or possession of the demised premises, the Lessee will pay to the Lessors all costs and expenses incurred by them in such action, including a reasonable attorney's fee;

That at the expiration of said term or sooner determination of this lease, it will peaceably surrender and deliver up to the Lessors possession of the lands hereby demised, together with all improvements thereon, in substantially good order and condition, reasonable wear and tear and damage by the elements, public enemy, or other unavoidable casualty or cause excepted; Provided, However, that nothing in this lease contained shall be deemed to prevent the Lessee from time to time from moving buildings and other improvements from one place to another on the demised premises, or from changing any such that has become old or worn or unsuitable by reason of obsolescence or otherwise for other that is new or suitable, or from discarding and disposing of such as is no longer required, or from making other changes on the demised premises by addition, subtraction or modification as it may deem advisable in the exer-

cise of good business judgment in the operation of the plantation or the business conducted on the demised premises; Provided that in case of sooner determination of this lease in respect to lands hereby demised classified as "Miscellaneous and Waste Lands" occasioned by the Lessors withdrawing the same as hereinafter provided, the Lessors shall reimburse the Lessee for all erections and improvements upon or belonging to the same if made by the Lessee, to the extent of the Lessee's interest therein as measured by the unexpired portion of said term, and in case the Lessors and the Lessee are unable to agree upon the amount, then such amount to be paid by the Lessors to the Lessee shall be determined by arbitration as hereinafter provided.

It Is Mutually Understood and Agreed by the parties hereto as follows:

(a) That in the event the demised premises or any part thereof shall be required, taken or condemned for any public use, then, in every such case, the estate and interest of the Lessee in the part of the premises taken shall at once cease and determine, and the Lessee shall not by reason of such taking be entitled to any claim either against the Lessors or others for compensation or indemnity for the taking of any land or water, or of any improvements which shall have been made prior to January 1, 1936, and all compensation payable or to be paid by reason thereof shall be payable to and be the sole property of the Lessors and the Lessee shall have no interest in or claim to such compensation or any part thereof whatso-

ever; Provided, However, and it is hereby agreed that such compensation as shall represent the value of any growing crops and cane stools shall be payable to and be the sole property of the Lessee; and such compensation as shall represent the value of any improvements or buildings made or constructed after January 1, 1936, shall be divided between the Lessors and the Lessee as their interests shall appear, dependent upon the then unexpired term of this lease; and it is further agreed that if such taking shall so affect the remaining premises held by the Lessee under this lease, or so affect the operation of the Lessee's remaining lands and tenancies, or the business being conducted thereon as to cause substantial damage to the Lessee, then and in that event the Lessee shall have the right to present and pursue its claim for damages and be compensated therefor so long as such action or the payment of such damage shall not affect nor diminish the compensation payable to the Lessors as stipulated hereinabove;

(b) That the term "by-product of sugar or sugar cane" as used herein shall mean any product which remains over in the cultivation of sugar cane or the manufacture of sugar, and which possesses an actual or potential value of its own in the form in which it remains over; and the term "product other than sugar cane or sugar" as used herein shall mean any product which is produced on the demised premises other than water and sugar cane and which possesses an actual or potential value of its own; and that the Lessee shall not sell any product derived from the processing in whole or

in part of a by-product of sugar or sugar cane, nor any product or by-product derived from the processing in whole or in part of a product other than sugar cane or sugar, without first obtaining from the Lessors written permission so to do, and agreeing with the Lessors upon the method by which the percentage rental with respect thereto shall be calculated;

(c) That the premises hereby demised above the approximate 650 foot contour line may be withdrawn from the operation of this lease after December 31, 1945 at any time during the remainder of said term by either the Lessee or the Lessors upon complying with the following conditions;

(1) That said premises or any portion thereof not then being used by the Lessee for the growing of sugar cane or the production, development, storage or conveyance of water, or any use then requiring or which may thereafter require the payment of percentage rental or which are not then being subleased by the Lessee as **hereinbefore provided**, may be withdrawn by the Lessors upon notifying in writing the Lessee or its agent, C. Brewer and Company, Limited, at its office in Honolulu, T. H. of such intention and the specific areas to be withdrawn not less than twelve months prior to the date such withdrawal is to become effective; provided that the Lessee may prevent such withdrawal by notifying, in writing, the Lessors or their agents in Honolulu, T. H., at least six months before the expiration of said twelve months of its objection to such withdrawal and agreeing with the Lessors to pay such additional rent for the

said premises as may be agreed upon or as may be determined by arbitration as hereinafter provided;

(2) That the Lessors will bear all of the expenses connected with such withdrawal, including the Lessee's cost of re-adjustment, re-location and re-installation of any plantation utilities as may be thereby affected, including, but without limitation, roads, railroads, ditches, flumes, siphons and fences; that they will assume and bear all costs and expenses of road construction, maintenance and upkeep occasioned or required by such withdrawal, and where such withdrawal is the proximate cause of substantially increasing the cost of maintenance and upkeep of plantation roads or the construction of new roads to be used jointly by the plantation and the Lessors or persons holding under them then to the extent of such additional costs and expenses the Lessors shall be solely liable and shall pay or reimburse the Lessee therefor unless the same shall be deemed by the Lessors to be unreasonable, in which event the amount payable by the Lessors shall be determined by arbitration as hereinafter provided; and that they will release the Lessee from all taxes and all assessments or charges imposed under authority of law and required under the terms of this lease to be paid by the Lessee to the extent that said taxes, assessments and charges relate to the areas withdrawn and to the extent to which such withdrawn lands create or increase the said assessments or charges but not taxes for the area remaining after such withdrawal;

(3) In case the major portion of the arable lands of said premises is withdrawn by the Lessors then any portion or all of the remaining premises may be withdrawn by the Lessee upon notifying in writing the Lessors or their agents in Honolulu, T. H. of such intention and the area to be withdrawn at least twelve months prior to the date such withdrawal is to become effective;

(d) That all matters of disagreement that may arise under this lease, which cannot be adjusted by the parties hereto to their mutual satisfaction, including any matter herein left to future mutual agreement, shall be settled by arbitration and at the desire of either party shall be submitted to and determined by three disinterested arbitrators, one to be appointed by each of the parties hereto, and either party may give to the other written notice of a desire to have an arbitration of the matter or matters in dispute and name therein one of the arbitrators, whereupon the other party shall within ten (10) days after the receipt of such notice, name another arbitrator, and, in case of failure so to do, the party who has named an arbitrator shall have the right to apply to a Circuit Judge of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, requesting him to appoint an arbitrator to represent the party so failing to appoint an arbitrator, and the two arbitrators thus appointed (in either manner), shall select and appoint a third arbitrator, and in the event that the two arbitrators so appointed shall, within ten (10) days after the naming of the second arbitrator fail to appoint the third arbitrator,

either party shall have the right to apply to such judge to appoint such third arbitrator, and the three arbitrators so appointed shall thereupon proceed to determine the matter or matters in question, and the decision of any two of them (including the disposition of the costs of the arbitration) shall be final, conclusive and binding upon both parties, and judgment may be entered upon such award by the Circuit Court of the First Circuit unless the same shall be vacated, modified or corrected as provided in Chapter 116, Revised Laws of Hawaii 1935, or as the same may be amended or re-enacted from time to time, the provisions of which said statute shall apply hereto as fully as though incorporated herein;

Provided, However, and this lease is upon this condition, that if the Lessee shall fail to pay said rent or any part thereof within thirty (30) days after the same shall become due, whether the same shall or shall not have been legally demanded, or fail in any other respect faithfully to observe or **perform** any condition or covenant of this lease contained and on its part to be observed or performed, and any such default shall continue for thirty (30) days, or if the Lessee shall become bankrupt or insolvent or shall make an assignment for the benefit of its creditors, or if the Lessee should file any debtor proceedings, or take, or have taken against it any proceedings of any kind or character whatsoever under any provision of the Federal Bankruptcy Act seeking any readjustment, arrangement, postponement, composition or reduction of Lessee's debts, liabilities or obligations, or

abandon said premises or suffer this lease or any estate or interest hereunder to be taken under any writ of execution, then and in any such event the Lessors may at once enter into and upon the demised premises or any part thereof in the name of the whole and at their option terminate this lease by mailing a written notice to the Lessee, addressed to the Lessee at the last known address of the Lessee, and filing a copy of such notice in the Office of the Assistant Registrar of the Land Court of the Territory of Hawaii, or at the option of the Lessors, by filing a petition for an order cancelling said lease, which order may be issued by the Land Court on ex parte petition without summoning or notifying the Lessee, and thereupon take possession of the said premises and all improvements thereon, and thereby become wholly vested with all right, title and interest of the Lessee therein and may expel and remove from the said premises the Lessee or those claiming under it, and their effects, all without service of notice or resort to any legal process and without being deemed guilty of any trespass or becoming liable for any loss or damage which may be occasioned thereby and without prejudice to any other remedy or right of action which the Lessors may have for arrears of rent or for other or preceding breach of covenant of this lease on the part of the Lessee.

And It Is Hereby Expressly Agreed and Declared that the acceptance of rent by the Lessors shall not be deemed to be a waiver by them of any breach by the Lessee of any covenant herein contained, or of the Lessors' right to terminate this

lease for breach of covenant; that the term "premises" wherever it appears herein includes and shall be deemed or taken to include (except where such meaning would be clearly repugnant to the context) all buildings and improvements on January 1, 1941, or at any time thereafter built on the lands hereby demised and all water arising thereon or appurtenant thereto, and that the term "Lessors" in these presents shall include the Lessors, their executors, administrators, heirs, successors in trust and assigns, and also that the term "Lessee" shall include the Lessee, its successors and permitted assigns.

In Witness Whereof the parties hereto have caused this instrument and four other instruments of the same date and tenor to be duly executed the day and year first above written.

/s/ EDITH AUSTIN,

/s/ MABEL FRAZAR AUSTIN,

/s/ LINDSLEY AUSTIN,

/s/ DOROTHY BRADSTREET
AUSTIN,

/s/ JOHN FRAZAR AUSTIN,

/s/ MABEL FRAZAR AUSTIN,

/s/ LINDSLEY AUSTIN,

and

BOSTON SAFE DEPOSIT &
TRUST COMPANY,

By /s/ JOHN H. EATON, JR.,

Vice-President & Trust Officer,

Trustees under the Will and of the Estate of Walter Austin, Deceased, but not individually.

HONOLULU PLANTATION
COMPANY,

By /s/ JOHN D. McKEE,
President.

By /s/ C. F. JACOBSON,
Secretary.

(Duly Acknowledged.)

HONOLULU PLANTATION EXHIBIT 9-G

(Admitted in Evidence 12-3-46)

AMENDMENT OF LEASE

This Indenture made this 2nd day of December, 1943, by and between George M. Collins, John K. Clarke, Frank E. Midkiff, Edwin P. Murray and Joseph B. Poindexter, all citizens of the United States of America, of the City and County of Honolulu, Territory of Hawaii, Trustees under the Will and of the Estate of Bernice P. Bishop, deceased, parties of the first part, and Honolulu Plantation Company, a California corporation carrying on business in the Territory of Hawaii, whose business and post-office address in said Territory is c/o C. Brewer and Company, Limited, 827 Fort Street, Honolulu aforesaid, and a majority of whose officers and directors are likewise citizens of the United States of America, party of the second part,

Witnesseth That:

Whereas the then Trustees under said Will and of said Estate, as Lessors, and the said party of the second part, as Lessee, did on the 21st day of March, 1936, enter into an indenture of lease, being Bishop Estate Lease No. 5500, recorded in Liber 1415, pages 1-46, Hawaiian Registry of Conveyances, wherein the Lessors therein named demised to the said party of the second part twelve parcels of land comprising certain portions of the Ahupuaas of Halawa and Waiawa, of the land of Aiea, and of the Ilis of Kaonchi, Kumuulu, Waimano and Poupouwela, situate in the District of Ewa, Honolulu aforesaid, containing an aggregate net area of 7485.30 acres, more or less, all as described in said lease, for the term of 30 years from January 1, 1936; and

Whereas said Lease 5500 was cancelled as of June 30, 1940, by mutual agreement dated the 28th day of January, 1941, recorded in Liber 1627, pages 308-310, said Registry; and

Whereas the then Trustees under said Will and of said Estate, as Lessors, and the said party of the second part, as Lessee, did on the said 28th day of January, 1941, enter into a new indenture of lease, being Bishop Estate Lease No. 6600, recorded in Liber 1627, pages 326-370, said Registry, and also filed with the Assistant Registrar of the Land Court, Territory of Hawaii, as Document No. 56933 and so noted on Transfer Certificate of Title No. 28655 issued to the parties of

the first part, wherein the Lessors therein named demised to the said party of the second part fifteen parcels of land comprising certain portions of the Ahupuaas of Halawa and Waiawa, of the land of Aiea, and of the Ilis of Kaonohi, Kumuulu, Waimano and Poupouwela, situate in the District of Ewa, Honolulu aforesaid, containing an aggregate net area of 7274.954 acres, more or less, all as described in said lease, for the term of 25 years and 6 months from July 1, 1940; and

Whereas said new Lease 6600 has heretofore been modified by partial surrender dated November 6, 1941, recorded in Liber 1787, pages 328-329, said Registry, by supplementary agreement dated Mar. 8, 1943, unrecorded, and also as a result of certain proceedings in eminent domain brought by the United States of America affecting portions of the premises demised by said Lease 6600; and

Whereas the parties hereto have agreed to a modification of the terms and conditions of said Lease 6600 as hereinafter set forth and to the confirmation thereof as so modified;

Now, Therefore, This Agreement Witnesseth: That the parties hereto agree to change the date "July 1, 1940" appearing in line 19, and extending into line 20, and in line 28, both on page 29 of said Lease 6600, and also in lines 20 and 29 on page 40 of said Lease 6600, to read "January 1, 1936."

In Witness Whereof the parties of the first part as such Trustees as aforesaid have set their hands, and the party of the second part has caused its name and corporate seal to be set by its attorney-

in-fact, hereunto and to two other instruments of the same date and tenor, the day and year first before written.

/s/ EDWIN P. MURRAY,

/s/ GEO. M. COLLINS,

/s/ J. K. CLARKE,

Trustees under the Will and of the Estate of
Bernice P. Bishop, deceased.

HONOLULU PLANTATION
COMPANY,

By /s/ P. E. SPALDING,

Its Attorney-in-Fact.

(Corporate Seal.)

Above named Trustees acknowledged Dec. 7, 1943, before Wm. D. McKillop. Notary, First Circuit, T. H.

P. E. Spalding acknowledged Dec. 2, 1943, before Chas. H. Merriam, Notary, First Circuit, T. H.

LEASE No. 6600

This Indenture, made as of the first day of July, 1940, by and between George M. Collins, John K. Clarke, Frank E. Midkiff and Edwin P. Murray, all of the City and County of Honolulu, Territory of Hawaii, Trustees under the Will and of the Estate of Bernice P. Bishop, deceased, hereinafter called the "Lessors", of the first part, and Honolulu Plantation Company, a California corporation

carrying on business in the Territory of Hawaii, whose business and post-office address in said Territory is c/o C. Brewer and Company, Limited, 827 Fort Street, Honolulu aforesaid, hereinafter called the "Lessee", of the second part,

Witnesseth: That the Lessors, in consideration of the rent hereinafter reserved, and of the covenants herein contained and on the part of the Lessee to be observed and performed, and the surrender by the Lessee and the cancellation as of June 30, 1940, of Bishop Estate Lease No. 5500, recorded in the Hawaiian Registry of Conveyances in Book 1415, page 1, held by the Lessee, do hereby demise and lease unto the Lessee:

All those fifteen (15) certain pieces or parcels of land situate in the District of Ewa, Honolulu aforesaid, comprising portions of the Ahupuaa of Halawa, of the land of Aiea (Grants 8945 and 10197), of the Ili of Kaonohi (Kalauao), of the Ili of Kumuulu (Waiau), of the Ili of Waimano, of the Ili of Poupouwela (Manana-iki) and of the Ahupuaa of Waiawa, containing an aggregate net area of seven thousand two hundred seventy-four and nine hundred fifty-four thousandths (724.954) acres, more or less, as delineated on Bishop Estate Maps Nos. 627, 963, 2353 to 2361 both inclusive, 2387, 2565, 2566, 2567, 2582 and 2583 on file in the office of the Lessors, and classified as follows:

CLASSIFICATION OF NET AREA DEMISED

Land	Cane (acres)	Cane Lands		Potential Cane Lands (acres)	Forest		Miscellaneous Lands (acres)	Total Area (acres)
		Contributory (acres)	Total (acres)		Reservation Lands (acres)			
Halawa	537.237	51.680	588.917	28.100	2325.00		166.320	3106.337
Aiea	10.538	2.040	12.578	.....	.....		.....	12.578
Kaonohi	413.962	49.020	462.982	0.450	865.00		177.938	1506.370
Kumuulu	380.194	44.500	424.694	25.030	1170.00		587.730	2207.454
Waiau & Waimalu	2.700	0.160	2.860	.....	.....		0.075	2.935
Waiau	.....	.....	.....	.....	.....		2.130	2.130
Waimano	1.647	0.420	2.067	.....	.....		.....	2.067
Poupouwela & Waiawa	375.513	22.820	398.333	25.450	.....		9.30	433.083
Sub-Totals	1721.791	170.640						
		Totals	1892.431	79.030	4360.00		943.493	7274.954

the same being more particularly bounded and described as follows:

PARCEL "A" (Halawa):

Comprising a portion of the Ahupuaa of Halawa, being L. C. Aw. 7712 and L. C. Aw. 8516B, R. P. 6717 to M. Kekuanaoa and Kamaikui; all of L. C. Aw. 9332B, R. P. 771, Apanas 1 and 2 to Kealohanui; and all of L. C. Aw. 2156, R. P. 766, Apana 3 to Oponui, and being described as follows:

Beginning at a point at the Northwest corner of this parcel of land, adjoining the land of Aiea and on the Easterly side of Kamehameha Highway, the coordinates of said point referred to Government Survey Triangulation Station "Salt Lake" being 3770.19 feet North and 8348.42 feet West, and running thence by azimuths measured clockwise from true South:

1. $237^{\circ} 48' 20''$ —1341.58 feet along the land of Aiea to a concrete monument marked "14";
2. $237^{\circ} 41' 00''$ —55.10 feet along same across Moanalua Road to a concrete monument marked "13";
3. $305^{\circ} 27' 00''$ —600.00 feet along the Northerly side of Moanalua Road to a pipe;
4. $215^{\circ} 27' 00''$ —625.36 feet along Aiea School Lot to a pipe;
5. $125^{\circ} 27' 00''$ —342.65 feet along same to a pipe;
6. $237^{\circ} 47' 30''$ —612.30 feet along land of Aiea to a monument called "Halawa Rock";
7. $240^{\circ} 59' 00''$ —5050.80 feet along same to a pipe in concrete called "Pohakuumeume";

8. $234^{\circ} 38' 00''$ —2530.60 feet along same to a pipe at the 650-foot contour; Thence along the center of a road along the approximate 650-foot contour for the next ten courses, the direct azimuths and distances being;
9. $332^{\circ} 00' 00''$ —270.00 feet;
10. $283^{\circ} 00' 00''$ —270.00 feet;
11. $267^{\circ} 00' 00''$ —240.00 feet;
12. $336^{\circ} 00' 00''$ —240.00 feet;
13. $285^{\circ} 00' 00''$ —350.00 feet;
14. $245^{\circ} 00' 00''$ —400.00 feet;
15. $24^{\circ} 00' 00''$ —270.00 feet;
16. $321^{\circ} 00' 00''$ —140.00 feet;
17. $23^{\circ} 00' 00''$ —300.00 feet;
18. $328^{\circ} 00' 00''$ —170.00 feet to the edge of pali; Thence along pali along the 650-foot contour for the next two courses, the direct azimuths and distances being:
19. $235^{\circ} 00' 00''$ —1670.00 feet;
20. $205^{\circ} 10' 00''$ —487.20 feet to the forest reserve;
21. $300^{\circ} 10' 30''$ —1705.40 feet along forest reserve to a “†” on large rock;
22. $60^{\circ} 47' 00''$ —11639.70 feet along Land Court Application 966 to the center of Halawa Stream; Thence down the middle of Halawa Stream along Land Court Application 966 for the next seventeen courses, the direct azimuths and distances being:
23. $120^{\circ} 30' 00''$ —65.00 feet;
24. $101^{\circ} 08' 00''$ —265.00 feet;
25. $78^{\circ} 30' 00''$ —223.00 feet;
26. $28^{\circ} 50' 00''$ —280.00 feet;

27. $65^{\circ} 40' 00''$ —100.00 feet;
28. $84^{\circ} 25' 00''$ —800.00 feet;
29. $39^{\circ} 35' 00''$ —210.00 feet;
30. $54^{\circ} 00' 00''$ —230.00 feet;
31. $359^{\circ} 35' 00''$ —130.00 feet;
32. $34^{\circ} 30' 00''$ —332.00 feet;
33. $357^{\circ} 25' 00''$ —200.00 feet;
34. $345^{\circ} 10' 00''$ —168.00 feet;
35. $76^{\circ} 40' 00''$ —340.00 feet;
36. $21^{\circ} 55' 00''$ —350.00 feet;
37. $43^{\circ} 00' 00''$ —300.00 feet;
38. $39^{\circ} 42' 00''$ —420.40 feet;
39. $13^{\circ} 17' 00''$ —26.00 feet; Thence continuing down the middle of Halawa Stream along the remainder of the land of Halawa for the next twelve courses, the direct azimuths and distances being:
 40. $62^{\circ} 13' 53''$ —151.99 feet;
 41. $73^{\circ} 45' 00''$ —300.00 feet;
 42. $58^{\circ} 20' 00''$ —239.00 feet;
 43. $14^{\circ} 38' 00''$ —100.00 feet;
 44. $65^{\circ} 03' 00''$ —100.00 feet;
 45. $82^{\circ} 56' 00''$ —181.40 feet;
 46. $93^{\circ} 07' 00''$ —180.00 feet;
 47. $115^{\circ} 00' 00''$ —151.90 feet;
 48. $147^{\circ} 20' 00''$ —100.40 feet;
 49. $177^{\circ} 47' 00''$ —201.80 feet;
 50. $153^{\circ} 26' 00''$ —151.00 feet;
 51. $123^{\circ} 50' 00''$ —323.63 feet to a point on the Southeast side of Kamehameha Highway;
 52. $203^{\circ} 32' 00''$ —116.87 feet along the Southeast side of Kamehameha Highway;

53. $293^{\circ} 32' 00''$ —5.00 feet along same;
54. $203^{\circ} 32' 00''$ —710.19 feet along same; Thence on a curve to the right with a radius of 5689.65 feet along same, the chord azimuth and distance being:
55. $204^{\circ} 25' 57''$ —178.57 feet;
56. $115^{\circ} 19' 54''$ —5.00 feet along Kamehameha Highway; Thence on a curve to the right with a radius of 5694.65 feet along the Southeast side of Kamehameha Highway, the chord azimuth and distance being:
57. $207^{\circ} 13' 42''$ —376.95 feet;
58. $209^{\circ} 07' 30''$ —1797.11 feet along the Southeast side of Kamehameha Highway; Thence on a curve to the left with a radius of 1115.48 feet along same, the chord azimuth and distance being:
59. $203^{\circ} 12' 54.5''$ —281.64 feet;
60. $284^{\circ} 37' 12''$ —5.00 feet along Kamehameha Highway; Thence on a curve to the left with a radius of 1120.48 feet along same to the point of beginning, the chord azimuth and distance being:
61. $193^{\circ} 48' 36.5''$ —31.67 feet and containing a Gross Area of 760.964 acres, as delineated on Bishop Estate Maps 2357, 2358, 2359, 2360 and 2361;

Excepting and Reserving, however, the following:

EXCEPTION "A":

All kuleanas within the bounds of this parcel owned by other than the Lessors, being listed as follows:

L. C. Aw.	R.P.	Apana	Awardee	Area, Acres	
2139	761	—	Kinilau	1.045	
1996	769	—	Naea	2.000	
9332	765	1 & 2	Kaheana	0.540	
2047	759	1 & 2	Kekio no Kanuai	1.000	
2096	758	1 & 2	Kenui	0.938	
2042	762	1 & 2	Kauohilo	0.790	
2043	764	2	Kawaha	0.290	
2044	768	1, 2 & 3	Kaupali	1.014	
2048	760	1 & 2	Kauhalu	0.870	
2016	455	1 & 2	Makakane	0.326	
2057	456	1 & 2	Keawe	0.463	
2131	457	1 & 2	Kanihoalii no		
			Kaukiwaa	1.630	
1983	763	—	Hapule	3.659	14.565

EXCEPTION "B":

All other lands not owned by the Lessors and listed as follows:

Land Court Application 36, 1.420.

Portions L. C. Aw. 7712 & 8516B, R. P. 6717 to M. Kekuanaoa and Kamaikui.

By Deed dated January 10, 1928 (Hon. Plant. Co.)....	1.870	
By Deed dated April 16, 1937 (Moanalua Road).....	3.756	7.046
		<hr/>
Total.....		21.611
Gross Area	760.964	
Less Exceptions "A" and "B"	21.611	
		<hr/>
Net Area Demised	739.353	Acres

PARCEL "A-1" (Halawa):

Comprising a portion of the Ahupuaa of Halawa, being L. C. Aw. 7712 and L. C. Aw. 8516B, R. P. 6717 to M. Kekuanaoa and Kamaikui, and being described as follows:

Beginning at a pipe in concrete at the East corner of this parcel, the same being the end of Course 18 of Land Court Application 966, and running thence by azimuths measured clockwise from true South:

1. $57^{\circ} 42' 00''$ —1884.78 feet along Land Court Application 966;
2. $218^{\circ} 25' 00''$ —1859.78 feet along remainder of the land of Halawa;
3. $215^{\circ} 01' 59''$ —91.96 feet along same;
4. $323^{\circ} 49' 00''$ —656.60 feet along Land Court Application 966 to the point of beginning and containing an area of 14.054 acres, as delineated on Bishop Estate Map 2357.

PARCEL "A-2" (Halawa):

Comprising a portion of the Ahupuaa of Halawa, being L. C. Aw. 7712 and L. C. Aw. 8516B, R. P. 6717 to M. Kekuanaoa and Kamaikui, and being described as follows:

Beginning at a point at the Northeast corner of this parcel of land, adjoining the land of Aiea and on the Westerly side of Kamehameha Highway, the coordinates of said point referred to Government Survey Triangulation Station "Salt Lake" being 3711.26 feet North and 8442.03 feet West, and running thence by azimuths measured clockwise from true South:

On a curve to the right with a radius of 1045.48 feet along the Westerly side of Kamehameha Highway, the chord azimuth and distance being:

1. $23^{\circ} 12' 54.5''$ —215.29 feet;
2. $29^{\circ} 07' 30''$ —1797.11 feet along the Westerly side of Kamehameha Highway; Thence on a curve to the left with a radius of 5764.65 feet, along same, the chord azimuth and distance being:
3. $27^{\circ} 13' 42''$ —381.59 feet;
4. $115^{\circ} 19' 54''$ —5.00 feet along Kamehameha Highway; Thence on a curve to the left with a radius of 5769.65 feet along the Westerly side of Kamehameha Highway, the chord azimuth and distance being:
5. $24^{\circ} 25' 57''$ —181.08 feet;
6. $23^{\circ} 32' 00''$ —710.19 feet along the Westerly side of Kamehameha Highway;
7. $293^{\circ} 32' 00''$ —5.00 feet along same;
8. $23^{\circ} 32' 00''$ —107.77 feet along same;
9. $118^{\circ} 01' 00''$ —202.65 feet along the middle of the Halawa Stream;
10. $118^{\circ} 36' 13''$ —38.54 feet along same;
11. $193^{\circ} 38' 00''$ —100.00 feet more or less; Thence along high water mark for the next four courses, the direct azimuths and distances being:
12. $120^{\circ} 30' 00''$ —233.00 feet more or less;
13. $168^{\circ} 10' 00''$ —185.00 feet more or less;
14. $211^{\circ} 45' 00''$ —1247.00 feet more or less;
15. $200^{\circ} 55' 00''$ —1150.00 feet more or less;

16. $251^{\circ} 10' 00''$ —687.27 feet along land of Aiea to a U. S. monument;
17. $237^{\circ} 48' 20''$ —299.81 feet along same to the point of beginning and containing a Gross Area of 33.679 acres, and a Net Area of 29.930 acres after deducting the Oahu Railway and Land Company's right of way, as delineated on Bishop Estate Map 2358.

PARCEL "B" (Aiea):

Comprising portions of Land Patents (Grants) 8945 and 10197 to the B. P. Bishop Estate, and being described as follows:

Beginning at a monument marked U. S. No. 19 at the North corner of this parcel of land, the same being the East corner of Grant 4270, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Salt Lake" being 6037.83 feet North and 5597.80 feet West, and running thence by azimuths measured clockwise from true South:

1. $294^{\circ} 48' 00''$ —530.11 feet along U. S. Navy Reservation;
2. $81^{\circ} 49' 30''$ —143.87 feet;
3. $75^{\circ} 48' 00''$ —148.73 feet;
4. $51^{\circ} 11' 00''$ —73.06 feet;
5. $22^{\circ} 41' 00''$ —143.56 feet;
6. $60^{\circ} 59' 00''$ —675.74 feet;
7. $57^{\circ} 47' 30''$ —755.66 feet;
8. $150^{\circ} 24' 00''$ —125.49 feet; Thence on a curve to the left with a radius of 657.3 feet, the chord azimuth and distance being:
9. $238^{\circ} 17' 32''$ —218.87 feet; Thence on a curve

to the left with a radius of 519.1 feet, the chord azimuth and distance being:

10. 201° 26' 01"—393.94 feet;
11. 235° 45' 00"—1064.20 feet along Grant 4270 to the point of beginning and containing an area of 12.578 acres, as delineated on Bishop Estate Map 2360.

PARCEL "C" (Ili of Kaonohi):

Comprising a portion of the Ili of Kaonohi being L. C. Aw. 5524, R. P. 1963, Apana 6 to L. Konia; and portions of the following titles, i.e.:

L. C. Aw. 2494, L. P. 8145, Apanas 1 & 2 to Julia Kekoa,

L. C. Aw. 6156B, R. P. 745, Apana 1 to Mahoe,
L. C. Aw. 5583, R. P. 448 to Kaawaole, and all of the following titles, i. e.:

L. C. Aw. 2494, L. P. 8145, Apanas 3 and 4 to Julia Kekoa,

L. C. Aw. 6156B, R. P. 745, Apana 2 to Mahoe,

L. C. Aw. 9322, R. P. 455 to Hawea,

L. C. Aw. 5844, R. P. 3082 to Puleonui,

L. C. Aw. 5651, L. P. 8100 to Kaumiumi,

L. C. Aw. 5817, R. P. 752, Apanas 1 and 2 to Kamoku,

L. C. Aw. 9288, R. P. 744, Apanas 1 and 2 to Kaina, and an undivided 5/8 interest in L. C. Aw. 5906 and 9307, R. P. 754. Apanas 1 and 2 to Pupue, and being described as follows:

Beginning at a pipe on the Westerly side of this parcel of land, adjoining the Ili of Waieli, and on the Northeasterly side of the Oahu Railway and Land Company's railroad right of way, the co-

ordinates of said point of beginning referred to Government Survey Triangulation Station "Salt Lake" being 7026.9 feet North and 13,333.5 feet West, and running thence by azimuths measured clockwise from true South:

1. $222^{\circ} 57'$ —256.7 feet along the Ili of Waieli to a "†" on set stone;
2. $200^{\circ} 37'$ —104.3 feet along same to a pipe;
3. $245^{\circ} 35'$ —151.3 feet along L. C. Aw. 9400, R. P. 449, Apana 1 to Hilo no Kacio to a pipe;
4. $155^{\circ} 20'$ —132.0 feet along same to a pipe;
5. $65^{\circ} 35'$ —18.6 feet along same to a pipe;
6. $200^{\circ} 37'$ —476.6 feet along the Ili of Waieli to a "†" on set stone;
7. $210^{\circ} 10'$ —1452.0 feet along same to a "†" on set stone;
8. $229^{\circ} 42'$ —2113.3 feet along same to a "†" on set stone;
9. $225^{\circ} 28'$ —734.1 feet along same to a "†" on set stone; Thence along pali, along the Ili of Waieli for the next seventeen courses, the direct azimuths and distances being:
10. $267^{\circ} 06'$ —514.9 feet;
11. $237^{\circ} 00'$ —496.0 feet;
12. $235^{\circ} 40'$ —276.5 feet;
13. $239^{\circ} 51'$ —397.0 feet;
14. $242^{\circ} 42'$ —731.2 feet;
15. $267^{\circ} 37'$ —150.0 feet;
16. $240^{\circ} 25'$ —250.3 feet;
17. $263^{\circ} 41'$ —200.0 feet;
18. $219^{\circ} 38'$ —197.9 feet;
19. $252^{\circ} 25'$ —283.8 feet to a $1\frac{1}{4}$ inch pipe;

20. $260^{\circ} 36'$ —253.1 feet;
21. $261^{\circ} 48'$ —343.1 feet;
22. $223^{\circ} 52'$ —295.4 feet;
23. $242^{\circ} 04'$ —257.8 feet;
24. $253^{\circ} 54'$ —203.8 feet;
25. $268^{\circ} 01'$ —245.3 feet;
26. $279^{\circ} 30'$ —320.2 feet; Thence along the approximate 650-foot contour and along the center of road for the next five courses, by the following azimuths and distances;
27. $351^{\circ} 00'$ —245.0 feet;
28. $273^{\circ} 05'$ —181.0 feet;
29. $292^{\circ} 20'$ —900.0 feet;
30. $266^{\circ} 15'$ —401.5 feet;
31. $229^{\circ} 20'$ —575.0 feet to edge of pali; Thence along the approximate 650-foot contour for the next five courses, by the following azimuths and distances;
32. $244^{\circ} 30'$ —391.5 feet;
33. $298^{\circ} 15'$ —236.0 feet;
34. $257^{\circ} 15'$ —1110.0 feet;
35. $264^{\circ} 30'$ —701.0 feet;
36. $243^{\circ} 30'$ —740.5 feet to the forest reserve;
37. $318^{\circ} 45' 25''$ —330.0 feet along the forest reserve to the center of the Kalauao Stream; Thence down the center of the Kalauao Stream along the Ahupuaa of Kalauao for the next four courses by the following azimuths and distances:
38. $71^{\circ} 00'$ —3270.0 feet;
39. $43^{\circ} 30'$ —2140.0 feet;
40. $73^{\circ} 45'$ —2975.0 feet;

41. $37^{\circ} 39'$ —2869.4 feet;
42. $37^{\circ} 05'$ —145.0 feet along the Ahupuaa of Kalauao to a pipe in concrete;
43. $154^{\circ} 31'$ —70.20 feet along land of Alaeauui to a pipe in concrete;
44. $92^{\circ} 00'$ —83.37 feet along same along stonewall to a pipe in concrete;
45. $182^{\circ} 00'$ —40.0 feet along land of Alaeauui along fence to the center of Kalauao Stream; Thence down the center of the Kalauao Stream for the next thirteen courses by the following azimuths and distances:
46. $71^{\circ} 25'$ —208.9 feet;
47. $26^{\circ} 00'$ —220.4 feet;
48. $20^{\circ} 29'$ —280.1 feet;
49. $40^{\circ} 20'$ —50.0 feet;
50. $34^{\circ} 56'$ —105.7 feet;
51. $40^{\circ} 27'$ —33.9 feet;
52. $70^{\circ} 39' 30''$ —119.8 feet;
53. $64^{\circ} 16'$ —70.2 feet;
54. $40^{\circ} 00'$ —62.5 feet;
55. $346^{\circ} 10'$ —57.3 feet;
56. $58^{\circ} 25'$ —135.0 feet;
57. $93^{\circ} 15'$ —108.0 feet;
58. $63^{\circ} 55'$ —107.1 feet;
59. $139^{\circ} 47' 30''$ —338.4 feet along Grant 169 to Wm. E. Gill to a pipe in concrete;
60. $60^{\circ} 01' 30''$ —321.0 feet along same;
61. $65^{\circ} 40'$ —76.5 feet along same to a pipe;
62. $334^{\circ} 05'$ —87.1 feet along same;
63. $59^{\circ} 00'$ —42.2 feet along same to a pipe;
64. $326^{\circ} 55'$ —92.0 feet along same to a pipe;

65. $278^{\circ} 05'$ —52.5 feet along same to the center of the Kalauao Stream; Thence down the center of the Kalauao Stream for the next five courses by the following azimuths and distances:
66. $77^{\circ} 48' 40''$ —301.1 feet;
67. $88^{\circ} 28'$ —107.5 feet;
68. $116^{\circ} 15'$ —120.0 feet;
69. $87^{\circ} 04'$ —99.3 feet;
70. $64^{\circ} 00'$ —90.0 feet;
71. $355^{\circ} 44' 30''$ —33.9 feet along Grant 171 to Kuaana to a pipe;
72. $50^{\circ} 15'$ —500.3 feet along same to a pipe in concrete;
73. $42^{\circ} 00'$ —16.0 feet along same; Thence along high water mark for the next three courses, the direct azimuths and distances being:
74. $124^{\circ} 45'$ —130.0 feet;
75. $238^{\circ} 00'$ —91.0 feet;
76. $123^{\circ} 59' 30''$ —1505.3 feet;
77. $136^{\circ} 52'$ —153.67 feet along the Southwesterly side of the Oahu Railway and Land Company's railroad right of way;
78. $198^{\circ} 24'$ —45.5 feet across the Oahu Railway and Land Company's railroad right of way and along the Ili of Waieli to the point of beginning and containing a gross area of 672.294 acres, as delineated on Bishop Estate Maps 2353, 2354, 2355 and 2356;

Excepting and Reserving, however, the following:

EXCEPTION "A":

All kuleanas within the bounds of this parcel owned by other than the Lessors, being listed as follows:

L. C. Aw.	R.P.	Apana	Awardee	Area, Acres
9400	449	2	Hilo no Kaoio)	
9297	749	1 & 2	Kanikela)	4.304
5840 & 9308	755	1 & 2	Kuohao)	
5910 & 5934	446	—	Piko	1.653
9302	748	—	Kiikai	0.592
6184 & 9296	751	1 & 2	Ino	1.021
5577 & 9354	750	1 & 2	Kamakahiki	1.377
9353	746	1 & 2	Palau	0.999
5576 & 9313	3551	1, 2 & 3	Kuawahie	0.393
6104	747	—	Mahiai	2.068
6090	756	—	Makauwila no Lahela	
6156E	4813	1 & 2	Luahalikai	0.546
6054	447	—	Naue	1.259
5906	754	1 & 2	Walehau	1.152
School Grant 30, Apana 2			Pupue (3/8 interest)	0.283
				1.760
				<hr/>
				17.407

EXCEPTION "B"

Kuleanas leased by the Lessors and listed as follows:

L. C. Aw.	R.P.	Apana	Awardee	Area, Acres
6156	753	1 & 2	Nua	1.097
5581	6799	1 & 2	Kalaimanuia .....	.450
				<hr/>
				1.547

EXCEPTION "C"

All other lands not owned by the Lessors and listed as follows:

Portion L. C. Aw. 5524, R. P. 1963, Ap. 6 to L Konia Deeded April 7, 1908	0.650
Portion L. C. Aw. 5524, R. P. 1963, Ap. 6 to L. Konia Deeded June 20, 1933	0.741
Portion L. C. Aw. 5524, R. P. 1963, Ap. 6 to L. Konia Deeded September 29, 1931	0.193
Portion L. C. Aw. 5524, R. P. 1963, Ap. 6 to L. Konia Deeded November 26, 1889	1.840
Portion L. C. Aw. 5524, R. P. 1963, Ap. 6 to L. Konia, Portion L. C. Aw. 2494, R. P. 8145, Ap. 1 to Julia Kekoa, Portion L. C. Aw. 6156B, R. P. 745, Ap. 1 to Mahoe, Portion L. C. Aw. 6156, R. P. 753, Ap. 2 to Nua, Portion L. C. Aw. 5581, R. P. 6799, Ap. 1 & 2 to Kalaimanuia Deeded October 29, 1938 (Kamehameha Highway)	2.998
Portion L. C. Aw. 5524, R. P. 1963, Ap. 6 to L. Konia, Portion L. C. Aw. 5583, R. P. 448 to Kaawaole Deeded January 10, 1908	0.870
Portion L. C. Aw. 5524, R. P. 1963, Ap. 6 to L. Konia, Portion L. C. Aw. 6156, R. P. 753, Ap. 1 to Nua Deeded April 16, 1937 (Moanalua Road)	3.882
Portion L. C. Aw. 5524, R. P. 1963, Ap. 6 to L. Konia (McShane House Lot)	0.450
Portion L. C. Aw. 5524, R. P. 1963, Ap. 6 to L. Konia, Deeded August 19, 1938	0.340
Total	11.970
Grand Total	30.924
Total Gross Area	672.294 Acres
Less Exceptions "A", "B" and "C"	30.924 Acres
Net Area Demised	641.370 Acres

PARCEL "D" (Waiau)

Comprising a portion of the Ili of Kumuulu,
being L. C. Aw. 7713, R. P. 4475, Apana 35 to V.

Kamamalu, and portion of L. C. Aw. 10605, R. P. 6557, Apana 5 to J. Piikoi and of Grant 2861 to Joseph Narcisco, and being described as follows:

Beginning at a pipe in concrete near the West corner of this parcel of land adjoining the land of Waimano (L. C. Aw. 11029, Apana 3 to J. S. Stevenson), the coordinates of said point of beginning referred to Government Survey Triangulation Station "Ewa Church" being 139.9 feet South and 5759.3 feet East, and running thence by azimuths measured clockwise from true South:

1. $197^{\circ} 30'$ —999.3 feet along L. C. Aw. 11029, Apana 3 to J. S. Stevenson to a "†" in set stone;
2. $225^{\circ} 06'$ —1316.9 feet along same to a "†" on set stone;
3. $217^{\circ} 06'$ —1716.0 feet along same to a pipe;
4. $218^{\circ} 06'$ —1650.0 feet along same to a pipe;
5. $206^{\circ} 37' 30''$ —1508.9 feet along same to the center of the Waiau Stream and passing over a "†" on set stone at 1433.9 feet; Thence up the center of the Waiau Stream along Government Land of Waimano to a point, the direct azimuth and distance being:
6. $210^{\circ} 57' 30''$ —2124.7 feet;
7. $203^{\circ} 30'$ —190.0 feet along Government Land of Waimano to a "†" on set stone; Thence along the center of ridge along same to a pipe in concrete, the direct azimuth and distance being:
8. $238^{\circ} 24'$ —1411.0 feet;
9. $227^{\circ} 14'$ —3166.7 feet along the Government Land of Waimano to an iron pin;

10. $230^{\circ} 25'$ —2574.0 feet along fence along same to a pipe in concrete;
11. $251^{\circ} 45'$ —933.5 feet along same to a pipe;
12. $310^{\circ} 04'$ —490.5 feet along fence along forest reserve to a stake;
13. $271^{\circ} 40'$ —1027 feet along fence along same to a pipe;
14. $270^{\circ} 00'$ —780.0 feet along fence along same;
15. $297^{\circ} 00'$ —1010.5 feet along fence along same to a pipe;
16. $359^{\circ} 20'$ —240.0 feet along fence along same;
17. $62^{\circ} 45'$ —235.5 feet along fence along same to a pipe;
18. $66^{\circ} 00'$ —678.0 feet along fence along same;
19. $49^{\circ} 15'$ —510.0 feet along fence along same;
20. $16^{\circ} 30'$ —512.0 feet along fence along same to a pipe;
21. $3^{\circ} 55'$ —1453.7 feet along fence along same to a pipe in concrete;
22. $54^{\circ} 52'$ —100.0 feet along Land Court Application 950 to a pipe;
23. $33^{\circ} 11'$ —532.2 feet along same to a pipe;
24. $64^{\circ} 50'$ —600.0 feet along same to a pipe;
25. $104^{\circ} 30'$ —680.0 feet along same to a pipe;
26. $73^{\circ} 40'$ —450.0 feet along same to a pipe;
27. $112^{\circ} 00'$ —360.0 feet along same to a pipe;
28. $71^{\circ} 50'$ —450.0 feet along same to a pipe;
29. $58^{\circ} 54'$ —2907.0 feet along same to a “†” on set stone;
30. $70^{\circ} 24'$ —1431.7 feet along same to the center of the Waimalu Stream and passing over a pipe at 1411.7 feet; Thence down the center of the

Waimahu Stream along Land Court Application 950 for the next twenty-six courses, the direct azimuths and distances being:

31. $160^{\circ} 31'$ —67.8 feet;
32. $103^{\circ} 52'$ —92.0 feet;
33. $60^{\circ} 22'$ —76.3 feet;
34. $54^{\circ} 57'$ —143.6 feet;
35. $65^{\circ} 38'$ —69.4 feet;
36. $57^{\circ} 50'$ —151.1 feet;
37. $32^{\circ} 38'$ —100.4 feet;
38. $47^{\circ} 46'$ —124.8 feet;
39. $78^{\circ} 34'$ —181.0 feet;
40. $65^{\circ} 58'$ —72.2 feet;
41. $8^{\circ} 13'$ —179.4 feet;
42. $27^{\circ} 00'$ —113.8 feet;
43. $12^{\circ} 42'$ —121.0 feet;
44. $38^{\circ} 41'$ —150.8 feet;
45. $65^{\circ} 30'$ —150.0 feet;
46. $40^{\circ} 28'$ —61.7 feet;
47. $356^{\circ} 14'$ —88.6 feet;
48. $5^{\circ} 20'$ —170.6 feet;
49. $16^{\circ} 00'$ —91.0 feet;
50. $12^{\circ} 02'$ —160.3 feet;
51. $339^{\circ} 47'$ —84.6 feet;
52. $0^{\circ} 37'$ —103.0 feet;
53. $29^{\circ} 58'$ —77.4 feet;
54. $52^{\circ} 02'$ —162.8 feet;
55. $30^{\circ} 30'$ —71.5 feet;
56. $336^{\circ} 31'$ —123.0 feet;
57. $53^{\circ} 26'$ —980.0 feet along Land Court Application 950 to a “†” on set stone and passing over a pipe at 44.4 feet;

58. $13^{\circ} 50'$ —778.1 feet along same to a “†” on set stone;
59. $359^{\circ} 25'$ —601.0 feet along same to a pipe;
60. $18^{\circ} 57'$ —2794.6 feet along same to a point on the North side of Moanalua Road, from which the direct azimuth and distance to a pipe in concrete is $18^{\circ} 57' 51.70$ feet;
61. $94^{\circ} 14'$ —12.12 feet along the North side of Moanalua Road;
62. $96^{\circ} 34'$ —176.69 feet along same;
63. $102^{\circ} 30'$ —209.85 feet along same;
64. $105^{\circ} 11'$ —417.84 feet along same;
65. $87^{\circ} 05'$ —67.14 feet along same to a “†” on set stone;
66. $76^{\circ} 19' 30''$ —702.30 feet along same;
67. $82^{\circ} 32'$ —250.00 feet along same;
68. $75^{\circ} 40'$ —408.40 feet along same;
69. $81^{\circ} 39'$ —50.00 feet along same;
70. $90^{\circ} 34'$ —89.22 feet along same;
71. $95^{\circ} 34'$ —119.40 feet along same;
72. $104^{\circ} 00'$ —16.82 feet along same;
73. $107^{\circ} 50'$ —65.00 feet along same;
74. $115^{\circ} 20'$ —65.30 feet along same;
75. $120^{\circ} 40'$ —57.70 feet along same;
76. $120^{\circ} 29'$ —175.79 feet along same;
77. $96^{\circ} 20'$ —127.50 feet along same;
Thence on a curve to the right with a radius of 300.0 feet along same for the next two courses, the chord azimuths and distances being:
78. $97^{\circ} 26' 15''$ —11.56 feet;
79. $107^{\circ} 15' 00''$ —90.84 feet;

80. $115^{\circ} 57' 30''$ —12.51 feet along the Northerly side of Kamehameha Highway;
81. $196^{\circ} 45' 00''$ —55.85 feet;
82. $120^{\circ} 44' 30''$ —161.57 feet;
83. $27^{\circ} 49' 00''$ —23.54 feet;
84. $120^{\circ} 59' 00''$ —23.90 feet;
85. $111^{\circ} 10' 00''$ —61.77 feet;
86. $177^{\circ} 39' 00''$ —28.60 feet;
87. $197^{\circ} 30' 00''$ —23.82 feet along L. C. Aw. 11029, Ap. 3 to J. S. Stevenson to the point of beginning and containing a net area of 1037.454 acres, as delineated on Bishop Estate Maps 2565, 2566 and 2567.

PARCEL "E" (Waiau and Waimalu)

Comprising a portion of the Ili of Kumuulu, being L. C. Aw. 7713, R. P. 4475, Apana 35 to V. Kamamalu; portion of land conveyed by Kamehameha IV to A. Phillips; and Lot 4-A, area 0.69 acre, of Land Court Application 950, being all of the land described in Owners' Transfer Certificate of Title 16654 issued to the Trustees of the Bernice P. Bishop Estate; and being described as follows:

Beginning at a pipe in concrete monument on the North side of this parcel of land, said point being also the North corner of Lot 4-A of Land Court Application 950 and running thence by azimuths measured clockwise from true South:

1. $274^{\circ} 14'$ —126.4 feet along the Southerly side of Moanalua Road;
2. $12^{\circ} 46'$ —240.0 feet along Lot 4-B of Land Court Application 950;

3. $9^{\circ} 14'$ 126.4 feet along same;
4. $12^{\circ} 46'$ —153.1 feet along same;
5. $28^{\circ} 20'$ —176.3 feet along same;
6. $64^{\circ} 45'$ —138.2 feet along portion of Grant 130 to S. P. Hanchett;
7. $19^{\circ} 40'$ —340.45 feet;
8. $129^{\circ} 35'$ —13.71 feet;
9. $190^{\circ} 40'$ —282.30 feet;
10. $282^{\circ} 30'$ —12.01 feet along the Southerly side of Moanalua Road;
11. $276^{\circ} 34'$ —180.30 feet along same to the point of beginning and containing an area of 2.935 acres, as delineated on Bishop Estate Map 2565.

PARCEL "F" (Waiau)

Comprising a portion of the land of Kaakauwaihau, being L. C. Aw. 3834 and 7244, Part 1, R. P. 7268 to Puhi, and being described as follows:

Beginning at a concrete post marked "†" at the South corner of this parcel and on the Northeast side of the Oahu Railway and Land Company's 40-foot right of way, the same being the initial point of Land Court Application 950, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Ewa Church" being 2418.3 feet South and 8005.8 feet East, and running thence by azimuths measured clockwise from true South:

Along the Northeast side of the Oahu Railway and Land Company's 40-foot right of way, the direct azimuth and distance being:

1. $137^{\circ} 16'$ —823.0 feet more or less;
2. $229^{\circ} 21'$ —104.0 feet more or less, along Bishop Estate land;
3. $219^{\circ} 21'$ —357.1 feet along L. C. Aw. 9410B, Apana 3, to Kanealii Wahaolelo to a concrete post marked “†”;
4. $316^{\circ} 52'$ —292.4 feet along Grant 130 to S. P. Hanchett to a concrete post marked “†”;
5. $324^{\circ} 02'$ —148.0 feet along same to a concrete post marked “†”;
6. $30^{\circ} 25'$ —79.0 feet along Land Court Application 950 to the point of beginning and containing an area of 2.130 acres, as delineated on Bishop Estate Map 627.

PARCEL “G” (Waimano)

Comprising a portion of the land of Waimano, being L. C. Aw. 7713, R. P. 4475, Ap. 47 to V. Kamamalu, and being described as follows:

Beginning at an “arrow” cut in concrete at the Northeast corner of this parcel and on the South side of Kamehameha Highway, the coordinates of said point of beginning referred to Government Survey Triangulation Station “Ewa Church” being 152.06 feet South and 5414.21 feet East, and running thence by azimuths measured clockwise from true South:

1. $358^{\circ} 54'$ —140.90 feet along L. C. Aw. 11029, Ap. 2 to J. S. Stevenson to a “†” on rock;
2. $343^{\circ} 24'$ —69.20 feet along same to a pipe;
3. $69^{\circ} 34'$ —65.20 feet along same to a pipe;
4. $344^{\circ} 20'$ —17.00 feet along same to a pipe;

5. 62° 01'—108.75 feet along Bishop Estate land to a pipe;
6. 74° 42'—45.54 feet along same to a pipe;
7. 99° 27'—62.85 feet along same to a pipe;
8. 114° 37'—158.60 feet along same to a pipe;
9. 28° 58'—36.68 feet along same to a pipe;
10. 64° 11'—30.00 feet along Grant 237 to P. F. Manini to a “†” on concrete post;
11. 143° 15'—56.85 feet along same to a “†” on concrete post;
12. 234° 30'—466.60 feet along same to a “†” cut in concrete;
13. 295° 57' 30"—87.26 feet along the South side of Kamehameha Highway to the point of beginning and containing an area of 2.067 acres, as delineated on Bishop Estate Maps 627 and 2565.

PARCEL “H” (Portion of Waiawa and
Manana-iki)

Comprising a portion of the Ahupuaa of Waiawa, being L. C. Aw. 7713, R. P. 4475, Apana 46 to Victoria Kamamalu; a portion of Manana-iki (Ili of Poupouwela) being L. C. Aw. 7713, R. P. 4475, Apana 48 to Victoria Kamamalu; all of L. C. Aw. 9320, Apanas 1, 2 and 3 to Keoho; and all of L. C. Aw. 9372, Apanas 1 and 2 to Keiki, and being described as follows:

Beginning at a point at the Northeast corner of this parcel of land, and on the South side of Kamehameha Highway, the coordinates of said point of beginning referred to Government Survey Triangulation

gulation Station "Ewa Church" being 853.31 feet North and 2853.44 feet East, and running thence by azimuths measured clockwise from true South:

1. $46^{\circ} 36'$ —639.17 feet along fence to a pipe in concrete;
2. $145^{\circ} 20'$ —175.0 feet along Grant 159 to J. Lovell and L. C. Aw. 9372, Apana 2 to Homaiikawaa;
3. $72^{\circ} 30'$ —93.0 feet along L. C. Aw. 9378, Apana 2 to Homaiikawaa;
4. $45^{\circ} 20'$ —106.0 feet along same;
5. $131^{\circ} 00'$ —41.6 feet along Grant 159 to J. Lovell;
6. $50^{\circ} 30'$ —52.2 feet along same;
7. $309^{\circ} 00'$ —20.5 feet along same;
8. $52^{\circ} 00'$ —140.6 feet along same;
9. $324^{\circ} 00'$ —43.0 feet along same;
10. $58^{\circ} 00'$ —66.0 feet along same;
11. $140^{\circ} 30'$ —77.4 feet along L. C. Aw. 7723, Apana 1 to Hopoe;
12. $63^{\circ} 00'$ —184.0 feet along same and along Grant 159 to J. Lovell;
13. $45^{\circ} 30'$ —332.1 feet along L. C. Aw. 7723, Apana 2 to Hopoe and along Grant 159 to J. Lovell to the center of Waiwa Stream; Thence up the center of Waiwa Stream for the next thirteen courses by the following azimuths and distance:
14. $108^{\circ} 03'$ —319.4 feet;
15. $115^{\circ} 30'$ —222.0 feet;
16. $127^{\circ} 30'$ —293.7 feet;
17. $173^{\circ} 02'$ —349.5 feet;

18. $180^{\circ} 10'$ —355.3 feet;
19. $180^{\circ} 00'$ —49.0 feet;
20. $185^{\circ} 00'$ —80.0 feet;
21. $161^{\circ} 30'$ —162.0 feet;
22. $145^{\circ} 30'$ —195.0 feet;
23. $48^{\circ} 00'$ —70.0 feet;
24. $91^{\circ} 15'$ —150.0 feet;
25. $104^{\circ} 45'$ —102.2 feet;
26. $131^{\circ} 05'$ —85.3 feet to the South side of Kamehameha Highway;
27. $266^{\circ} 29'$ —23.70 feet along the South side of Kamehameha Highway;
28. $176^{\circ} 29'$ —15.00 feet along Kamehameha Highway;
29. $266^{\circ} 29'$ —128.37 feet along the South side of Kamehameha Highway; Thence on a curve to the right with a radius of 1397.5 feet along same, the direct azimuth and distance being:
30. $267^{\circ} 41' 30''$ —58.90 feet;
31. $358^{\circ} 54'$ —20.00 feet along Kamehameha Highway; Thence on a curve to the right with a radius of 1377.5 feet along the South side of Kamehameha Highway, the direct azimuth and distance being:
32. $271^{\circ} 58' 30''$ —147.78 feet;
33. $185^{\circ} 03'$ —20.00 feet along Kamehameha Highway; Thence on a curve to the right with a radius of 1397.5 feet, along the South side of Kamehameha Highway, the direct azimuth and distance being:
34. $281^{\circ} 12'$ —299.42 feet;

35. $287^{\circ} 21'$ —100.03 feet along same to a concrete monument;
36. $287^{\circ} 25'$ —289.76 feet along the South side of Kamehameha Highway;
37. $17^{\circ} 25'$ —5.00 feet along same;
38. $287^{\circ} 25'$ —250.00 feet along same;
39. $197^{\circ} 25'$ —5.00 feet along same;
40. $287^{\circ} 25'$ —250.00 feet along same;
41. $17^{\circ} 25'$ —5.00 feet along same;
42. $287^{\circ} 25'$ —27.03 feet along same; Thence on a curve to the right with a radius of 5595.72 feet along same, the chord and azimuth and distance being:
43. $288^{\circ} 52' 15''$ —284.01 feet;
44. $290^{\circ} 19' 30''$ —86.90 feet along same;
45. $200^{\circ} 19' 30''$ —5.00 feet along same;
46. $290^{\circ} 19' 30''$ —848.37 feet along same to the point of beginning and containing a gross area of 45.084 acres, as delineated on Bishop Estate Maps 963 and 2582.

Excepting and Reserving, however, the following:

EXCEPTION "A"

All of the kuleanas within the bounds of this parcel owned by other than the Lessors, and listed as follows:

L. C. Aw.	R.P.	Apana	Awardee	Area, Acres
7732	871	2	Manuiki no Kapae	0.700
9373	223	—	Kamoku	0.520
9376	875 & 5311	1 & 2	Kupihea	1.218
9377	208	1 & 2	Lio	1.306
				<hr/> 3.744

Gross Area 45.084 Acres

Less Exception "A" 3.744 Acres

Net Area Demised 41.340 Acres

PARCEL "I" (Portion of Ahupuaa of Waiawa)

Comprising a portion of the Ahupuaa of Waiawa, being L. C. Aw. 7713, R. P. 4475, Apana 46 to Victoria Kamamalu; a portion of Manana-iki (Ili of Poupouwela), being L. C. Aw. 7713, R. P. 4475, Apana 48 to Victoria Kamamalu, and being described as follows:

Beginning at a point at the Southeast corner of this parcel, on the Southwest side of Grant 2060 to J. Raymond and L. Bernard, and on the North side of Kamehameha Highway, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Ewa Church" being 932.44 feet North and 2813.47 feet East, and running thence by azimuths measured clockwise from true South:

1. 110° 19' 30"—788.21 feet along the North side of Kahehameha Highway;
2. 200° 19' 30"—5.00 feet along same;

3. $110^{\circ} 19' 30''$ —86.90 feet along same; Thence on a curve to the left with a radius of 5675.72 feet along same, the chord azimuth and distance being:
4. $108^{\circ} 52' 15''$ —288.07 feet;
5. $107^{\circ} 25'$ —27.03 feet along same;
6. $17^{\circ} 25'$ —5.00 feet along same;
7. $107^{\circ} 25'$ —250.00 feet along same;
8. $197^{\circ} 25'$ —5.00 feet along same;
9. $107^{\circ} 25'$ —250.00 feet along same;
10. $17^{\circ} 25'$ —5.00 feet along same;
11. $107^{\circ} 25'$ —289.84 feet along same;
12. $107^{\circ} 21'$ —100.03 feet along the North side of Kamehameha Highway; Thence on a curve to the left with a radius of 1467.5 feet along same, the direct azimuth and distance being:
13. $98^{\circ} 38'$ —444.79 feet;
14. $165^{\circ} 00'$ —176.49 feet along stonewall along Bishop Estate land;
15. $224^{\circ} 23'$ —88.8 feet along fence along L. C. Aw. 10942, Apana 1 to Wm. Wallace to a “†” on concrete post;
16. $130^{\circ} 21'$ —148.8 feet along same to a “†” on concrete post;
17. $43^{\circ} 16'$ —81.9 feet along same to a stonewall; Thence along stonewall along Bishop Estate land to a “†” on concrete post, the direct azimuth and distance being:
18. $106^{\circ} 30'$ —107.0 feet;
19. $87^{\circ} 06'$ —203.6 feet along stonewall along L. C. Aw. 10942, Apana 2, to Wm. Wallace to a “†” on concrete post; Thence along stonewall

along Bishop Estate land to a “†” on a rock, the direct azimuth and distance being:

20. $100^{\circ} 11'$ —219.6 feet;
21. $114^{\circ} 14'$ —102.5 feet;
22. $100^{\circ} 00'$ —216.0 feet along stonewall along L. C. Aw. 10942, Apana 4 to Wm. Wallace;
23. $104^{\circ} 10'$ —110.0 feet along stonewall along L. C. Aw. 4213, Apana 1 to Kauhi;
24. $98^{\circ} 52'$ —233.1 feet along stonewall along L. C. Aw. 5591 and 9357 to Kekua to a “†” on concrete post; Thence along fence along side of pali to the top of Waiawa gulch for the next four courses, by the following azimuths and distances:
25. $140^{\circ} 30'$ —222.0 feet;
26. $93^{\circ} 05'$ —230.0 feet;
27. $163^{\circ} 21'$ —231.5 feet;
28. $214^{\circ} 30'$ —130.0 feet;

Thence along the top of pali along the Easterly side of Waiawa gulch for the next fourteen courses, by the following azimuths and distances:

29. $170^{\circ} 30'$ —119.7 feet;
30. $215^{\circ} 37'$ —821.5 feet;
31. $231^{\circ} 15'$ —830.0 feet;
32. $207^{\circ} 27'$ —430.0 feet;
33. $273^{\circ} 40'$ —806.5 feet;
34. $226^{\circ} 06'$ —750.00 feet;
35. $192^{\circ} 27'$ —930.00 feet;
36. $213^{\circ} 15'$ —668.0 feet;
37. $241^{\circ} 00'$ —1162.0 feet;
38. $220^{\circ} 45'$ —664.0 feet;

39. $236^{\circ} 40'$ —580.0 feet;
40. $267^{\circ} 10'$ —315.0 feet;
41. $281^{\circ} 35'$ —598.5 feet;
42. $249^{\circ} 43'$ —510.0 feet;
43. $11^{\circ} 40'$ —60.0 feet along Grant 2060 to J. Raymond and L. Bernard to a pipe;
44. $21^{\circ} 43'$ —528.0 feet along same;
45. $33^{\circ} 59'$ —4546.0 feet along same;
46. $8^{\circ} 14'$ —726.0 feet along same;
47. $8^{\circ} 06'$ —1254.0 feet along same;
48. $311^{\circ} 41'$ —787.25 feet along same to the point of beginning and containing a net area of 365.883 acres, as delineated on Bishop Estate Map 2582.

PARCEL “J” (Portion of Ahupuaa of Waiawa)

Comprising a portion of the Ahupuaa of Waiawa, being L. C. Aw. 7713; R. P. 4475, Apana 46 to Victoria Kamamalu, and being described as follows:

Beginning at a pipe in concrete at the East corner of this parcel of land, the same being on the Westerly side of Grant 2060 to J. Raymond and L. Bernard, the direct azimuth and distance to a Triangulation Station called “Camp” being $326^{\circ} 53'$ 430.41 feet and **the coordinates of the above** described initial point referred to Government Survey Triangulation Station “Ewa Church” being 10397.3 feet North and 6164.9 feet East, and thence running by azimuths measured clockwise from true South:

1. $24^{\circ} 39'$ —1570.8 feet along Grant 2060 to J. Raymond and L. Bernard to a pipe;

2. $11^{\circ} 40'$ —108.7 feet along same to edge of pali;
Thence along edge of pali for the next six courses by the following azimuths and distances:
3. $86^{\circ} 12'$ —594.4 feet;
4. $195^{\circ} 30'$ —310.0 feet;
5. $232^{\circ} 20'$ —275.5 feet;
6. $100^{\circ} 00'$ —141.0 feet;
7. $181^{\circ} 30'$ —706.0 feet;
8. $238^{\circ} 30'$ —1231.0 feet;
9. $351^{\circ} 28'$ —270.0 feet along Grant 2060 to J. Raymond and L. Bernard to the point of beginning and containing a net area of 25.86 acres, as delineated on Bishop Estate Map 2583.

PARCEL "K" (Forest Reserve, Ahupuaa of
Halawa)

Comprising a portion of the Ahupuaa of Halawa, being L. C. Aw. 7712 and L. C. Aw. 8516B, R. P. 6717 to M. Kekuanaoa and Kamaikui, and being described as follows:

Beginning at Government Survey Triangulation Station "Halawa Barrel" on the ridge between North and South Halawa, the same being the end of Course 39 of Land Court Application 966, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Salt Lake" being 9448.3 feet North and 6612.0 feet East, and thence running by azimuths measured clockwise from true South:

1. $60^{\circ} 47'$ —2036.9 feet along Land Court Application 966 to a "†" on large rock;

2. $120^{\circ} 10' 30''$ —2069.1 feet along Bishop Estate land;
3. $211^{\circ} 21'$ —629.8 feet along same along top of pali to a pipe;
4. $190^{\circ} 08'$ —643.0 feet along same to a pipe in concrete marked "103";
5. Thence along the center of the ridge between North Halawa and Aiea to a place called "Pu'u Uau";
6. Thence along the center of the ridge between Kalauao and North Halawa to the top of the Koolau Range;
7. Thence along the top of the Koolau Range along the land of Heeia to a pipe at the end of Course 160 of Land Court Application 1100; Thence along the top of the Koolau Range along Land Court Application 1100 for the next five courses, by the following azimuths and distances:
 8. $352^{\circ} 06'$ —1507.60 feet to a pipe;
 9. $321^{\circ} 36'$ —635.10 feet to a pipe;
 10. $47^{\circ} 45'$ —1437.30 feet to a pipe;
 11. $0^{\circ} 18'$ —787.80 feet to a pipe;
 12. $2^{\circ} 31'$ —1436.70 feet to a pipe;
 13. Thence down the center of the ridge between North and South Halawa to the point of beginning and containing an area of 2325 Acres, as delineated on Bishop Estate Map 2387.

PARCEL "L" (Forest Reserve, Ili of Kaonohi)

Comprising a portion of the Ili of Kaonohi, being L. C. Aw. 5524, R. P. 1963, Apana 6 to L. Konia, and being described as follows:

Beginning a a standard "F. R. Mon." on ridge on the Westerly side of this parcel of land, the coordinates of which referred to Government Survey Triangulation Station "Salt Lake" being 13845.0 feet North and 630.9 feet West, and thence running by azimuths measured clockwise from true South:

1. $156^{\circ} 59'$ —581.0 feet along Bishop Estate land;
2. $221^{\circ} 21'$ —102.2 feet along the Ili of Waieli to a $1\frac{1}{4}$ inch pipe;
3. $175^{\circ} 15'$ —971.6 feet down spur and across Hanaiki Valley to a pipe on ridge;
4. $235^{\circ} 27'$ —717.5 feet along ridge to a pipe; Thence along the center of ridge, along Land Court Application 950 for the next two courses, by the following azimuths and distances:
5. $246^{\circ} 00' 30''$ —921.7 feet to a pipe;
6. $241^{\circ} 31'$ —885.65 feet to a pipe; Thence along the center of the ridge, along Parcel 2 of Land Court Application 344 for the next two courses, by the following azimuths and distances:
7. $247^{\circ} 54'$ —2155.2 feet to a pipe;
8. $246^{\circ} 28' 30''$ —1943.8 feet to a pipe; Thence along the center of ridge along L. C. Aw. 8525B, Apana 3 to Julia Alapai Kauwa to a pipe, the direct azimuth and distance being:
9. $240^{\circ} 27'$ —1379.4 feet; Thence along the center of ridge along Parcel 1 of Land Court Appli-

cation 344 to a pipe, the direct azimuth and distance being:

10. $252^{\circ} 38'$ —93.4 feet;
11. Thence up along the center of ridge along the remainder of the land of Waimalu to the top of the Koolau Range;
12. Thence along the top of the Koolau Range in a Southeasterly direction along Kahaluu and a portion of Heeia to the dividing ridge between the Ahupuaa of Kalauao and North Halawa;
13. Thence down the center of the Kalauao Stream along the Ahupuaa of Kalauao to the makai boundary of the forest reserve;
14. $138^{\circ} 45' 25''$ —932.4 feet along Bishop Estate land to the point of beginning and containing an area of 865 Acres, as delineated on Bishop Estate Map 2387.

PARCEL "M" (Forest Reserve, Ili of Kumuulu)

Comprising a portion of the Ili of Kumuulu, being L. C. Aw. 7713, R. P. 4475, Apana 35 to Victoria Kamamalu, and being described as follows:

Beginning at a pipe in concrete at the South corner of this parcel of land, the same being the end of Course 57 of Land Court Application 950, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Ewa Church" being 8876.1 feet North and 18913.4 feet East, and thence running by azimuths measured clockwise from true South:

1. $183^{\circ} 55'$ —1453.7 feet along Bishop Estate land to a pipe;

2. $196^{\circ} 30'$ —512.0 feet along same;
3. $229^{\circ} 15'$ —510.0 feet along same;
4. $246^{\circ} 00'$ —678.0 feet along same to a pipe;
5. $242^{\circ} 45'$ —235.5 feet along same;
6. $179^{\circ} 20'$ —240.0 feet along same to a pipe;
7. $117^{\circ} 00'$ —1010.5 feet along same;
8. $90^{\circ} 00'$ —780.0 feet along same to a pipe;
9. $91^{\circ} 40'$ —1027 feet along same to a stake;
10. $130^{\circ} 04'$ —495.0 feet along same to a pipe;
11. $251^{\circ} 45'$ —2440.0 feet more or less, along the Government land of Waimano to a point on ridge;
12. Thence up the center of ridge adjoining the Government land of Waimano to the top of the Koolau Range;
13. Thence along the top of the Koolau Range along Waihee to a pipe at the end of Course 93 of Land Court Application 950; Thence down the center of ridge along Land Court Application 950 for the next 30 courses, by the following azimuths and distances:
14. $60^{\circ} 47'$ —1051.0 feet;
15. $45^{\circ} 30'$ —610.0 feet;
16. $80^{\circ} 00'$ —860.0 feet;
17. $9^{\circ} 00'$ —200.0 feet;
18. $70^{\circ} 00'$ —1340.0 feet;
19. $107^{\circ} 30'$ —530.0 feet;
20. $45^{\circ} 55'$ —2868.0 feet;
21. $339^{\circ} 30'$ —920.0 feet;
22. $22^{\circ} 00'$ —250.0 feet;
23. $120^{\circ} 00'$ —310.0 feet;
24. $64^{\circ} 00'$ —530.0 feet;

25. $109^{\circ} 54'$ —502.0 feet;
26. $50^{\circ} 00'$ —460.0 feet;
27. $85^{\circ} 00'$ —450.0 feet;
28. $75^{\circ} 30'$ —550.0 feet;
29. $46^{\circ} 00'$ —1160.0 feet;
30. $87^{\circ} 00'$ —680.0 feet;
31. $18^{\circ} 00'$ —280.0 feet;
32. $64^{\circ} 50'$ —1450.0 feet;
33. $3^{\circ} 30'$ —140.0 feet;
34. $50^{\circ} 31'$ —513.0 feet to a pipe;
35. $66^{\circ} 04'$ —730.1 feet;
36. $88^{\circ} 20'$ —500.0 feet;
37. $79^{\circ} 36'$ —1026.5 feet;
38. $47^{\circ} 50'$ —200.0 feet;
39. $47^{\circ} 40'$ —190.0 feet;
40. $84^{\circ} 10'$ —180.0 feet;
41. $84^{\circ} 30'$ —180.0 feet;
42. $73^{\circ} 50'$ —220.0 feet;
43. $73^{\circ} 20'$ —250.0 feet to a pipe;
44. $63^{\circ} 03'$ —522.7 feet along Land Court Application 950 to a pipe;
45. $88^{\circ} 08'$ —685.9 feet along same to a pipe;
46. $76^{\circ} 04'$ —292.4 feet along same to a pipe;
47. $79^{\circ} 13'$ —485.5 feet along same to a pipe;
48. $62^{\circ} 10'$ —275.9 feet along same to a pipe;
49. $77^{\circ} 00'$ —439.4 feet along same to the point of beginning and containing an area of 1170 Acres, as delineated on Bishop Estate Map 2387.

Together with all the buildings and improvements thereon.

Excepting and always reserving out of this demise:

(a) All rights granted by the Trustees of the Bernice P. Bishop Estate to the United States of America by Perpetual Easement dated September 26, 1923, recorded in said Registry in Book 704, page 1, to construct and forever operate and maintain utilities through, over and across portions of Parcel "A-2" (Halawa) of the lands hereby demised; and also all rights granted by the Lessors herein to the United States of America by Perpetual Easement dated May 28, 1940, recorded in said Registry in Book 1581, page 385, to construct and forever operate and maintain an underground communication cable line through and across portions of Parcel "A" (Halawa) of the lands hereby demised;

(b) The pole and wire lines of The Hawaiian Electric Company, Limited, as shall, at the commencement of the term of this lease, have been constructed over and across portions of the lands hereby demised, under easements granted by the Trustees of the Bernice P. Bishop Estate, together with all rights appurtenant thereto, and the renewals, extensions and replacements of said easements hereafter to be granted by the Lessors;

(c) All lands which the Lessors may require or deem necessary or desirable as rights-of-way for pole and wire lines of all kinds to be constructed and maintained by them or their assigns (either in addition to or in substitution for any existing pole and wire lines) upon, over or across the lands

hereby demised from any point or points in any direction, including all reasonable right of entry upon the demised premises for the construction, repair and maintenance of the same in efficient use and condition; it being understood and agreed that the Lessors' rights in this respect will be exercised in such manner as to occasion the Lessee the least possible interference with its use of the demised premises;

(d) The right unto the Lessors and their tenants and lessees of adjoining and neighboring lands reasonably to use, in common with the Lessee, such roads and trails as may exist upon the lands hereby demised;

(e) All antiquities, including all specimens of Hawaiian or other ancient art or handicraft which may be on the lands hereby demised during the term of this lease, together with the right at all times, either personally or by their agents, to enter the said lands for the purpose of searching and exploring for such antiquities and of removing the antiquities found thereon;

And subject to Bishop Estate Lease No. 2448 to Honolulu Plantation Company which will expire on August 31, 1940, the rent reserved thereunder to be paid by the Lessee until its expiration.

Subject also to the subleases heretofore made by the Lessee herein as lessee under said Bishop Estate Lease No. 5500, of portions of the lands hereby demised, to wit:

1. Sublease dated March 27, 1937, to Makiyo Sumida, of 6.01 acres of land at Kalauao, expiring

September 30, 1941, and reserving a net rental of \$230.00 per annum;

2. Sublease dated March 29, 1937, to Say Yuen, of approximately 2.16 acres of land at Kalauao, expiring September 30, 1941, and reserving a net rental of \$175.00 per annum;

3. Sublease dated July 3, 1937, to Kam Hee, of approximately 1.37 acres of land in the Ili of Kaonohi, at Kalauao, expiring September 30, 1942, and reserving a net rental of \$40.00 per annum;

4. Sublease dated November 27, 1937, to Konobu Kubo, of 0.816 acre of land at Piomoewai, in Hala-wa, expiring September 30, 1947, as modified thereafter by agreement dated February 7, 1938, reducing the rental reserved under this sublease from \$130.00 per annum to \$75.00 per annum effective as of October 1, 1937;

5. Sublease dated December 29, 1937, to R. Ip-pongi, of approximately 0.905 acre of land in the Ili of Kaonohi, at Kalauao, expiring December 31, 1939, and running from year to year thereafter, and reserving a net rental of \$27.00 per annum;

6. Sublease dated February 12, 1938, to Jikuo Yasutake, of approximately 0.052 acre of land at Waimano, expiring January 31, 1943, and reserving a net rental of \$1.00 per annum;

7. Sublease dated April 7, 1938, to Annie K. Akana, of 0.032 acre of land in the Ili of Kaonohi, at Kalauao, expiring March 31, 1965, and reserving a net rental of \$1.00 per annum;

8. Sublease dated August 15, 1938, to Libby, McNeill & Libby, of 25.86 acres of land at Waiawa,

expiring June 30, 1945, and reserving a net rental of \$254.50 per annum;

9. Sublease dated April 19, 1940, to The Hawaiian Electric Company, Limited, of easement rights for the construction, operation and maintenance of pole and wire lines over and across a certain parcel of land, ten feet wide, at Kalauao, expiring December 31, 1965, at a paid-up nominal rental of \$1.00 for the whole of the term; and

10. Sublease dated October 30, 1940, to the United States of America, of easement rights for the construction, operation and maintenance of a railroad for military purposes and cable and pipe lines over and across a certain parcel of land at Halawa, expiring December 31, 1965, at a paid-up nominal rental of \$1.00 for the whole of the term; which said subleases shall remain in force according to their respective terms and conditions;

To Have and To Hold the demised premises unto the Lessee from the first day of July, 1940, for the term of twenty-five (25) years and six (6) months thence next ensuing, subject to said exceptions and reservations and to said Lease No. 2448 and subject to the aforesaid subleases, the Lessee Yielding and Paying therefor during the said term unto the Lessors rent as follows:

A. MINIMUM RENTAL:

The minimum rent for the lands hereby demised, based on Fifteen Dollars (\$15.00) per acre per annum for "Cane Lands", Five Dollars (\$5.00) per acre per annum for "Potential Cane Lands"

and none for "Miscellaneous Lands" and "Forest Reservation Lands", shall be Twenty-eight Thousand Seven Hundred Eighty-one and 62/100 Dollars (\$28,781.62) per annum, and shall be payable in two equal payments of \$14,390.81 each in advance on the first day of January and the first day of July in each and every year during the continuance of this lease, without any deduction, the first two of such payments to be made on the execution of these presents. Said minimum rent shall be decreased for the remainder of the term at the rate of Fifteen Dollars (\$15.00) per acre per annum for each acre of "Cane Lands", and at the rate of Five Dollars (\$5.00) per acre per annum for each acre of "Potential Cane Lands", which may be required, taken or condemned for road or other public purposes, and the Lessors shall refund to the Lessee the unearned portion, if any, of the semi-annual installment of the rent which shall have been paid in advance.

B. PERCENTAGE RENTAL:

The percentage rent for the first half-year and for each calendar year thereafter of the term of this lease for the lands hereby demised shall be determined by ascertaining the sum, in cash, of the following:

1. Five per centum (5%) of the gross value of the ninety-six degree (96°) centrifugal raw sugar or its equivalent produced during said half-year and each calendar year thereafter from cane grown on the lands hereby demised, valued at the full

New York market price, Hawaiian basis, of ninety-six degree (96°) centrifugal raw sugar (at present officially reported from time to time by the Hawaiian Sugar Planters' Association, and in case such official reports are discontinued, such other base price as may be mutually agreed upon or as may be determined by means of arbitration as is hereinafter provided) or its equivalent averaged for each day, including Sundays and holidays, for the period of said half-year and each calendar year thereafter, without any deduction, to which shall be added any bounties, benefit payments or refunds received by the Lessee on account of sugar produced during said half-year and each calendar year thereafter in addition to the amount received by the Lessee on account of the sale of sugar;

2. Five per centum (5%) of the gross proceeds, without any deduction, received by the Lessee from the sale of each form of by-product of sugar or sugar cane produced during the term of this lease by the Lessee from cane grown on the lands hereby demised during said half year and each calendar year thereafter;

3. Five per centum (5%) of the gross proceeds, without any deduction, received by the Lessee from the sale of products and by-products of any kind, other than of sugar or sugar cane, produced or derived from the lands hereby demised during said half-year and each calendar year thereafter;

The amount of the percentage rent payable for the lands hereby demised shall be the amount, if any, by which percentage rent for the said lands

for said half-year and each calendar year thereafter exceeds the said minimum rent for the said lands for said half-year and each calendar year thereafter, and such amounts shall be paid by the Lessee to the Lessors within thirty (30) days after the end of said half-year and each calendar year thereafter; provided, however, that the Lessee may estimate the amount of rent due in case final figures are not available within said thirty days; such estimated amounts and rent paid in accordance therewith shall be subject to adjustment when final figures are obtainable.

In addition to the minimum and percentage rental hereinabove provided for, the Lessee shall Yield and Pay during the said term unto the Lessors the following rentals:

C. BUILDING AND IMPROVEMENT RENTAL:

An annual rent of One Thousand Five Hundred Seventy-five Dollars (\$1,575.00) for the use of the building and other improvements which were standing on the demised lands on July 1, 1940, to be paid in two equal payments, each in advance on the first day of January and the first day of July in each and every year during the continuance of this lease, without any deduction, the first two of such payments to be made on the execution of these presents. In the event the demised premises or any part thereof shall be required, taken or condemned by any public authority for any public use and by reason of such taking the Lessors shall receive

compensation for buildings and improvements which were standing on the demised lands on July 1, 1940, or which shall be subsequently thereto rebuilt, reconstructed, or replaced, then the annual rent for the use of the buildings and improvements shall be decreased at the rate of six per centum (6%) of the amount of the compensation so received by the Lessors.

D. RENTAL ON ACCOUNT OF SUBLEASE:

The Lessee shall also pay to the Lessors one-half of all the rents reserved by it under the said ten subleases to which this lease is subject, without any deduction, semi-annually in advance, in equal installments, on the first day of January and the first day of July in each and every year during the respective terms of said subleases, the first two of such installments prorated as of July 1, 1940 to be paid on the execution of these presents; and in the event that any additional subleases of portions of the lands hereby demised shall be executed by the Lessee, the Lessee shall Yield and Pay unto the Lessors a further and additional rent amounting to one-half of the rent reserved under any such additional sublease; such further and additional rent payable on account of any such additional sublease shall begin as of the date of commencement of such additional sublease and shall be paid by the Lessee to the Lessors, without any deduction, semi-annually in advance, in equal installments, during the term of such additional sublease, the first of such payments to be made on the

first day of January or the first day of July, as the case may be, next succeeding the date of commencement of such additional sublease, and shall include any rent accrued on account of such additional sublease at the date of such first payment.

And the Lessors hereby covenant with the Lessee that, upon payment by the Lessee of the rent as aforesaid and upon observance and performance of the covenants by the Lessee hereinafter contained, and the surrender and cancelation of said Lease 5500 held by the Lessee as hereinabove mentioned, the Lessee shall peaceably hold and enjoy the premises hereby demised for the said term without hindrance or interruption by the Lessors or any other person or persons lawfully or equitably claiming by, through or under them; and without limitation upon the general right hereby granted to use the lands hereby demised for any purpose not herein specifically reserved, restricted or denied, the Lessee shall have the right upon all lands hereby demised, including Forest Reservation Lands, to prospect, dig, bore, drill and tunnel for water, and to build dams, construct pumping stations, and to dig, excavate and otherwise construct reservoirs thereon for the storage of water, and to dig, lay, bore and construct ditches, pipe lines, water courses, tunnels and flumes thereon for conducting or leading water to the dams and reservoirs;

And the Lessee hereby covenants with the Lessors as follows:

That it (the Lessee) will pay the said rent in

lawful currency of the United States at the office of the Lessors in Honolulu, in manner aforesaid, without any notice or demand;

That it will also pay, when and as the same become due and payable, all taxes, rates, assessments, impositions, duties, charges and other outgoings of every description to which the demised premises or the Lessors or Lessee in respect thereof are now, or may during the said term become liable, and whether the same taxes, rates, assessments, impositions, duties, charges and other outgoings are or shall be assessed to or be payable or dischargeable by law by either the Lessors or Lessee, including all assessments or charges for any permanent benefit or improvement of the premises hereby demised or any part thereof, made under any betterment law or otherwise, or any assessments or charges for sewerage or street or sidewalk improvement or municipal or other charges which may be legally imposed upon the said premises, or to which the said premises or any part thereof or the Lessors or Lessee in respect thereof are now or may during the said term become liable; provided, however, that if any such assessments or charges shall be payable or may be paid in installments, the Lessee may elect to pay the same by installments and shall be required to pay only those installments which may become due and payable during the term of this lease;

That it will, at its own expense, during the whole of the said term, make, build, maintain and repair all fences, sewers, drains and roads which

may be required by law to be made, built, maintained and repaired upon or in connection with or for the use of the said premises or any part thereof; and also build all fences which, in the judgment of the Lessors, may be necessary to protect the reversion in any manner, and such also as may be necessary to prevent cattle, horses, and other grazing animals from straying from the lands hereby demised onto adjoining lands;

That it will, at its own expense, during the whole of the said term, well and substantially repair, maintain, amend and keep all buildings, reservoirs, dams, ditches, tunnels, flumes, water courses, wells and other improvements and boundary monuments now or hereafter built, made or constructed on the lands hereby demised and all necessary reparations and amendments whatsoever in good order and condition (excepting, however, such improvements and buildings as are of no value whatsoever to the interest of the Lessors and such as have been destroyed or irrevocably damaged by Act of God or the public enemy); and also, at its own expense, during the whole of said term, rebuild any and all buildings that may be destroyed by fire within a reasonable time after such destruction, unless any building so destroyed was of no value to the interest of the Lessors;

That it will permit the Lessors and their agents, at all seasonable times during the said term, to enter the demised premises and examine the state of repair and condition thereof and will repair and make good all defects of which notice shall

have been given by the Lessors or their agents with prompt expedition after the receipt of such notice;

That it will during the whole of the said term keep the demised premises in a strictly clean and sanitary condition and observe and perform all the laws, ordinances, rules and regulations relating to health and sanitation for the time being applicable in the premises, and will indemnify the Lessors and the estate and effects of the said Bernice P. Bishop, deceased, against all actions, suits, damages and claims by whomsoever brought or made by reason of the nonobservance or nonperformance of such laws, ordinances, rules and regulations or of this covenant;

That it will plant and complete prior to January 1, 1956 a barrier-forest zone of a width to be determined by mutual agreement and varying with the terrain, using trees and methods of planting satisfactory to the Lessors within and along the makai boundary of the Forest Reservation and will thereafter care for the trees and where necessary to secure a full stand, will replant where trees shall die or be destroyed; and will not cut down, fell or injure, or suffer to be cut down, felled or injured, such trees within the aforesaid barrier-forest except in making improvement thinnings;

That it will plant and complete the planting prior to January 1, 1956, of timber trees of commercial value of species and also in a manner satisfactory to the Lessors on all areas suitable to timber trees below the Forest Reservation which

are not suitable to other crops and which are reasonably accessible for such purposes, such areas to be determined by mutual agreement; and will thereafter care for the trees and where necessary to secure a full stand will replant where trees shall die or be destroyed; and will not cut down, fell or injure, or suffer to be cut down, felled or injured, any trees or saplings now or hereafter growing upon the lands hereby demised, without written permission from the Lessors except in making improvement thinnings and in preparing land for intensive cultivation, the intent of this covenant being to provide for a future supply of mature timber and in making improvement thinnings to furnish the Lessee with fuel, posts, poles, timber and other forest products;

That, except as hereinbefore expressly provided, the Lessee will not use the Forest Reservation Lands herein demised as Parcels "K", "L" and "M" for any other purpose than as Forest Reservation, and will at all times during the said term administer the same in cooperation with Forestry authorities of the Territory of Hawaii for the time being according to the improved methods adapted to a water conserving forest;

That it will, at all times during the said term, foster and encourage the natural reforestation of the Forest Reservation Lands hereby demised, and in prosecuting any work of developing water thereon and of diverting such water therefrom will take all reasonable and needful precautions to prevent unnecessary injury to the natural or planted forest growth;

That it will, at all times during the said term, take all reasonable precautions to keep cattle, horses and other grazing animals out of the Forest Reservation Lands and to prevent forest fires occurring thereon, and in case such fires shall occur will use all reasonable means at its command or under its control in having such fires speedily extinguished;

That, whenever requested by the Lessors so to do, the Lessee will, within six (6) months from the date of such request, at its own charge and expense, make and thereafter maintain during the whole of the said term such fencing as the Lessors may deem necessary to protect the Forest Reservation Lands hereby demised from the intrusion of cattle, horses and other grazing animals;

That it will from time to time and at least once each year during the said term, make a careful inspection of the Forest Reservation Lands hereby demised, and will during the month of January in each year (beginning 1942) submit to the Lessors a written report (in duplicate) of the results of such inspection, stating whether or not any animals detrimental to the forest cover or forest lands, or evidence thereof, or any other damage to or improper use of said forest cover or forest lands, were observed, and reporting on the general condition of the forest cover and the state of repair and condition of any fences erected for the protection of the Forest Reservation Lands;

That it will, in connection with any water investigation, development, construction, extension

and operation on the demised lands hereinabove authorized, furnish to the Lessors from time to time, and not less frequently than once each year during the term of this lease, a full and complete report and statement (in duplicate) of all work done, together with copies of all reports, surveys, maps, plans and other records secured in connection with such work; and will also keep, in a manner satisfactory to the Lessors, complete records of the quantity of water developed, if any, and will furnish copies of such records to the Lessors not less frequently than once in each year of the term of this lease, and, in the event that ~~the~~ Lessee shall develop water on lands not herein demised in such a manner that the flow of water therefrom becomes mixed with the water developed on the demised lands, will install and operate adequate water-measuring equipment and will make, keep and furnish the Lessors sufficient gaugings and records accurately to determine the quantity of water developed on the lands hereby demised;

That it will also, as soon as is reasonably practicable after the end of each calendar year during the term of this lease, furnish the Lessors a full and complete written report (in duplicate) which shall show (1) the acreage of cane harvested during such year on the demised premises segregated as to plantation fields and specifying the respective tonnages of cane and raw sugar, and crop cycles in months, for each of such fields, together with a list of areas by fields planned to be harvested during the following calendar year; (2) the

total tonnage of raw sugar produced during the preceding calendar year by the Lessee from cane grown on all land controlled by the Lessee; and (3) the quantities of each form of by-product of sugar or sugar cane produced during the preceding calendar year by the Lessee from cane grown on the demised premises, together with the quantities sold, amounts of gross proceeds received, the year during which such by-products were produced and the quantities remaining unsold at the close of such preceding year;

That it will also, as soon as is reasonably practicable after the end of each calendar year during the term of this lease, furnish the Lessors a full and complete written report (in duplicate) which shall show the quantities of each form of product and by-product, other than sugar and by-products of sugar or sugar cane, produced on the demised premises during the term of this lease, and which were sold during such calendar year, together with the amounts of gross proceeds received from the sale of each such other products;

That in the event that any part or parts of the demised lands shall at any time or times during the term of this lease be sublet by the Lessee to others, the Lessee will, as soon as is reasonably practicable after the end of each calendar year during the continuance of any such sublease, furnish the Lessors with a full and complete written report (in duplicate) which shall show the location and area of such parcel of land so sub-let, together with the term and rent reserved;

That the Lessee will, at all times during the usual office hours, permit the Lessors or their authorized agents and employees to have free access to all of its books of account, contracts and papers relative to the business carried on by it in respect of the premises hereby demised in so far as such books of account, contracts and papers shall pertain directly to the determination of the amount of gross proceeds hereinabove mentioned and to examine the same and make copies thereof or any part thereof, and generally to take and use such reasonable means as the Lessors shall deem fit for ascertaining that the accounts furnished by the Lessee are full and accurate and that the Lessee is otherwise faithfully carrying out the covenants herein contained and on its part to be observed and performed; and that it will furnish the Lessors henceforth with copies of the detailed annual reports for each year which are submitted by the Lessee to its stockholders;

That it will not make or suffer any strip or waste or unlawful, improper or offensive use of the premises demised herein, nor, without the consent in writing of the Lessors, mortgage or assign this lease, nor sublet or part with the possession of the whole or any part of the said demised premises;

That in case any water shall be developed or obtained by digging, boring, drilling, or tunneling on the demised premises, it will lead or conduct such water onto the cultivated areas, and use the same in connection with the operation of the

Lessee's business, including the irrigation of sugar cane or other crops, the development of power, the watering of live stock, or for domestic use, and none of such water shall be used on any adjacent land or sold to others before first being brought upon the agricultural lands hereby demised;

That in the use of the demised premises for the planting and cultivating of sugar cane, the Lessee will follow such use in accordance with the standards of good husbandry and approved practices then prevailing in the sugar industry in the Territory of Hawaii, and in the use of the demised premises for any other purpose whatsoever, the Lessee will follow the best of generally approved methods, and in pursuance of these provisions and in the exercise of such use the Lessee shall, by proper construction and use of drainage ditches and otherwise, take all reasonable precautions to prevent or arrest loss of soil by erosion, to the end that the rent payable under this lease shall be as large as might reasonably be expected; and will continue to do so during the continuance of this lease, with all reasonable skill, care, prudence and diligence, so long as it can be done with reasonable profit to the Lessee; it being understood, however, that in no event, except as herein expressly provided, shall this covenant be construed to diminish the minimum rent as hereinbefore specified;

That, in the event the Lessee is required to discontinue or temporarily curtail cane cultivation on land controlled by it, due to Governmental restric-

tions or in order that the Lessee may receive benefits from any general crop reduction program initiated by the Government or by an association of growers, it will not discontinue nor temporarily curtail the cultivation of cane on the demised premises in a greater ratio to the required total curtailment than the ratio the cane area cultivated on the demised premises bears to the total cane area cultivated by the Lessee;

That the Lessee will not, at any time during the said term, on behalf of either itself or others, acquire by purchase or exchange the title in or to any of the kuleanas or other fee simple holdings within the boundaries of the said lands of North Halawa, Ili of Kaonohi, Ili of Kumuulu, Ili of Poupouwela, and Waiawa, without first notifying the Lessors in writing of its intention so to do and giving them (the Lessors) the first opportunity of acquiring the title in such holdings, provided, however, that in case the Lessors shall elect to acquire the title in such holdings, and do acquire the same, the Lessee shall thereupon be offered the first opportunity of leasing the same at a rent which shall net the Lessors a return of six per centum (6) on the cost of the holdings thus acquired, for a period of years co-terminous with this lease and upon similar conditions;

That, in the event the Lessors shall bring and sustain an action against the Lessee for breach of any covenant or condition herein contained or for the recovery of possession of the demised premises, the Lessee will pay to the Lessors all costs and

expenses incurred by them in such action, including a reasonable attorney's fee;

That it will not permit or suffer the said premises or any part thereof to be used for or in connection with the manufacture or sale of ale, beer, wine, spirits or other alcoholic liquors; and

That at the end of said term or other sooner determination of this lease, the Lessee will peaceably deliver up to the Lessors possession of the lands hereby demised, together with all erections and improvements upon or belonging to the same, by whomsoever made, in good repair, order and condition, except such as are of no value to the interest of the Lessors and such as have been destroyed or irrevocably damaged by Act of God or the public enemy.

It Is Mutually Understood and Agreed by the parties hereto as follows:

(a) That in the event the demised premises or any part thereof shall be required, taken or condemned for any public use, then, in every such case, the estate and interest of the Lessee in the part of the premises taken shall at once cease and determine, and the Lessee shall not by reason of such taking be entitled to any claim either against the Lessors or others for compensation or indemnity of the taking of any land or water, or any buildings or other improvements as shall have been made prior to July 1, 1940, and all compensation payable or to be paid by reason thereof shall be payable to and be the sole property of the Lessors, and the Lessee shall have no interest in or claim

to such compensation or any part thereof whatsoever, provided, however, and it is hereby agreed that such compensation as shall represent the value of any growing crops shall be payable to and be the sole property of the Lessee; and such compensation as shall represent the value of any buildings or other improvements made or constructed after July 1, 1940, shall be divided between the Lessors and the Lessee as their interests shall appear, dependent upon the then unexpired term of the lease; and it is further agreed that if such taking shall so affect the remaining premises held by the Lessee under this lease, or so affect the operation of the Lessee's remaining lands and tenancies, or the business being conducted thereon as to cause substantial damage to the Lessee, then and in that event the Lessee shall have the right to present and pursue its claim for damages and be compensated therefor so long as such action or the payment of such damages shall not affect nor diminish the compensation payable to the Lessors as stipulated hereinabove. It being understood that the provisions of this paragraph shall apply to the proceedings in eminent domain brought by the United States of America to take as of September 5, 1940, Parcel "A-2" (Halawa) of the lands hereby demised containing a net area of 29.93 acres, classified herein as 13.74 acres "Cane Lands" and 16.19 acres "Miscellaneous Lands". By virtue of condemnation classification this paragraph is inoperative. Condemnation classification is given as 17.46 acre cane land and 12.47 acre miscellaneous land;

(b) That the term "by-product of sugar or sugar cane" as used herein shall mean any product which remains over in the cultivation of sugar cane or the manufacture of sugar, and which possesses an actual or potential value of its own in the form in which it remains over; and the term "product other than sugar cane or sugar" as used herein shall mean any product which is produced on the demised premises other than water and sugar cane and which possesses an actual or potential value of its own; and that the Lessee shall not sell any product derived from the processing in whole or in part of a by-product of sugar or sugar cane, nor any product or by-product derived from the processing in whole or in part of a product other than sugar cane or sugar, without first obtaining from the Lessors written permission so to do, and agreeing with the Lessors upon the method by which the percentage rental with respect thereto shall be calculated;

(c) That all matters of disagreement that may arise under this lease, which cannot be adjusted by the parties hereto to their mutual satisfaction, including any matter herein left to future mutual agreement, shall be settled by arbitration and at the desire of either party shall be submitted to and determined by three indifferent arbitrators, one to be appointed by each of the parties hereto, and either party may give to the other written notice of a desire to have an arbitration of the matter or matters in dispute and name therein one of the arbitrators, whereupon the other party shall

within ten (10) days after the receipt of such notice, name another arbitrator, and, in case of failure so to do, the party who has named an arbitrator shall have the right to apply to a Circuit Judge of the Circuit Court of the First Circuit of the Territory of Hawaii, requesting him to appoint an arbitrator to represent the party so failing to appoint an arbitrator, and the two arbitrators thus appointed (in either manner) shall select and appoint a third arbitrator, and in the event that the two arbitrators so appointed shall, within ten (10) days after the naming of the second arbitrator fail to appoint the third arbitrator, either party shall have the right to apply to such judge to appoint such third arbitrator, and the three arbitrators so appointed shall thereupon proceed to determine the matter or matters in question, and the decision of any two of them (including the disposition of the costs of the arbitration) shall be final, conclusive and binding upon both parties, and judgment may be entered upon such award by the Circuit Court of the First Circuit unless the same shall be vacated, modified or corrected as provided in Chapter 116, Revised Laws of Hawaii 1935, or as the same may be amended or reenacted from time to time, the provisions of which said statute shall apply hereto as fully as though incorporated herein;

(d) That in case the Lessors or the Lessee shall be ousted of the possession of any portion or portions of the said "Cane Lands", "Potential Cane Lands" or "Miscellaneous Lands" by reason of

the successful assertion of a paramount title, the minimum rent shall be decreased for the remainder of the term at the rate of Fifteen Dollars (\$15.00) per acre per annum for "Cane Lands" and at the rate of Five Dollars (\$5.00) per acre per annum for "Potential Cane Lands" of the possession of which such ouster shall have occurred.

Provided, However, and this demise is upon this condition, that if the Lessee shall fail to pay the said rent or any part thereof within thirty (30) days after the same becomes due, whether the same shall or shall not have been legally demanded, or shall become bankrupt, or shall fail to observe or perform faithfully any of the covenants herein contained and on the part of the Lessee to be observed and performed, or shall abandon the demised premises, the Lessors may at once reenter the demised premises or any part thereof in the name of the whole and, upon or without such entry, at their option terminate this lease without service of legal process and without prejudice to any other remedy or right of action for arrears of rent or for any preceding or other breach of contract, if, after written notice of any such default or breach of contract shall have been given by the Lessors to the Lessee, the Lessee shall have failed within thirty (30) days after the receipt of such written notice to remedy such default or breach of contract or justify its failure so to do to the satisfaction of the Lessors.

And It Is Hereby Expressly Agreed and Declared that the acceptance of rent by the Lessors

shall not be deemed to be a waiver by them of any breach by the Lessee of any covenant herein contained, or of the Lessors' right to terminate this lease for breach of covenant; that the term "premises" wherever it appears herein includes and shall be deemed or taken to include (except where such meaning would be clearly repugnant to the context) all buildings and improvements now or at any time hereafter built on the lands hereby demised and all water arising thereon or appurtenant thereto, and that the term "Lessors" in these presents shall include the Lessors, their successors in trust and assigns, and also that the term "Lessee" shall include the Lessee, its successors and permitted assigns.

In Witness Whereof the Lessors as such Trustees as aforesaid have set their hands, and the Lessee has caused its name and corporate seal to be set by its attorney-in-fact, hereunto and to two other instruments of the same date and tenor, this 28th day of January, 1941.

/s/ EDWIN P. MURRAY,

/s/ GEO. M. COLLINS,

/s/ J. K. CLARKE,

Trustees under the Will and of the Estate of
Bernice P. Bishop, Deceased.

(Corporate Seal.)

HONOLULU PLANTATION
COMPANY,

By /s/ R. A. COOKE,

Its Attorney-in-Fact.

(Duly Acknowledged.)

Entered of Record this 19th day of February,

A. D., 1941 at 9:15 o'clock a.m. and compared.
Mark N. Huckestein, Registrar of Conveyances.

Received for Registration Feb. 20, 1941. Oliver
R. Aiu, Assistant Registrar, Land Court.

Civil 514 etc.

HONOLULU PLANTATION EXHIBIT 9-I

(Admitted in Evidence 12-3-46)

Oahu Railway and Land Company
Honolulu, Hawaii

January 1, 1943.

Honolulu Plantation Company
C. Brewer & Company Limited, Agents
P. O. Box 3470
Honolulu, T. H.

Gentlemen:

Please be advised that we have conveyed to a subsidiary, The Hawaiian Land & Improvement Company Limited, the premises leased to your Company under date of July 24, 1936. Together with such small areas as have been added thereto.

The lease above referred to has been assigned to Hawaiian Land and Improvement Company Limited as July 1, 1942.

With this we are enclosing the usual rental bill covering the first six month period.

Very truly yours,

/s/ A. W. VAN VALKENBURG,
Secretary.

LEASE

This indenture, made this 24th day of July, 1936, by and between Oahu Railway and Land Company, a Hawaiian corporation, hereinafter called the "Lessor", of the first part, and Honolulu Plantation Company, a California corporation carrying on business in the Territory of Hawaii, hereinafter called the "Lessee", of the second part,

Witnesseth: That the Lessor, in consideration of the rent hereinafter reserved, and of the covenants herein contained and on the part of the Lessee to be observed and performed, does hereby demise and lease unto the Lessee:

All those two certain tracts or parcels of land situate at Waimano and Manana, District of Ewa, City and County of Honolulu, Territory of Hawaii, being portions of R. P. 2060 L.C.A. 11029, Apana 3, to John Stevenson, and Grant 2060 to Joseph Raymond and Louis Bernard, described as follows:

LOT I.

Being portions of R. P. 2060 L.C.A. 11029, Apana 3, to John Stevenson, and Grant 2060 to Joseph Raymond and Louis Bernard, lying on the mauka or North side of Kamehameha Highway, described as follows:

Beginning at a 1" pipe in concrete at the Southeast corner of this lot, on the boundary of the lands of Waiau and Waimano, on the North side of present Kamehameha Highway, the coordinates of said point of beginning referred to Government Survey

Triangulation Station "Ewa Church" being 140.53 feet South and 5759.55 feet East and running by true azimuth:

1. $110^{\circ} 28' 30''$ —444.50 ft. along fence along present Kamehameha Highway;
2. $114^{\circ} 17'$ —704.40 ft. along same;
3. $104^{\circ} 30'$ —241.40 ft. along same;
4. $105^{\circ} 34' 30''$ —496.12 ft. along same to a point where New Kamehameha Highway boundary meets the present Highway;
5. $110^{\circ} 19' 30''$ —180.64 ft. along North side of New Kamehameha Highway;
6. $202^{\circ} 00'$ —417.67 ft. along portion of L.C.A. 11029, Apana 3 to J. Stevenson, now owned by Ewa Bottling Works, Ltd.;
7. $112^{\circ} 00'$ —125.00 ft. along same;
8. $22^{\circ} 00'$ —84.00 ft. along same;
9. $112^{\circ} 00'$ —275.00 ft. along portion of Grant 2060 to Joseph Raymond and Louis Bernard, and along Land Patent 6442 to Lehua Avenue extension;
10. $202^{\circ} 00'$ —164.00 ft. along Lehua Avenue extension;
11. $112^{\circ} 00'$ —20.00 ft. along same at an angle to a point 25 feet from the center line of Waimano Home Road as described in a certain indenture made on the 4th day of May, 1927 by and between O. R. and L. Co. and the City and County of Honolulu and recorded in Liber No. 881, pages 216-218 of Hawaiian Registry of Conveyances;

Thence following along the Eastern side of said

Waimano Home Road Right-of-way, the next 8 courses run as follows:

12. $202^{\circ} 00'$ —7041.04 feet;
13. $197^{\circ} 15'$ —327.86 feet;
14. $233^{\circ} 30'$ —131.78 feet;
15. $242^{\circ} 50'$ —540.53 feet;
16. $231^{\circ} 05'$ —249.33 feet;
17. $245^{\circ} 50'$ —292.37 feet;
18. $274^{\circ} 30'$ —393.30 feet;
19. $289^{\circ} 00' 16''$ —358.08 feet to a point on the boundary of Government land at Waimano, known as Waimano Home site;
20. $337^{\circ} 55'$ —278.54 feet along said boundary;
21. $333^{\circ} 21' 20''$ —2843.70 feet along same to a “†” marked on a large boulder, located on South-east edge of Waimano Stream;
22. $264^{\circ} 55'$ —179.30 feet along same to a “†” on square set stone;
23. $26^{\circ} 37' 30''$ —1433.90 feet along Bishop Estate Land, Ili of Kumuulu, being L.C.A. 7713, R.P. 4475, Apana 35 to J. Stevenson, to a pipe in concrete; from which pipe a certain Triangulation Station known as ‘Waiau’ located on the bank of reservoir bears by true azimuth $318^{\circ} 31'$ and 269.75 feet.
24. $38^{\circ} 06'$ —1650.00 feet along same to a pipe;
25. $37^{\circ} 06'$ —1716.00 feet along same to a “†” on square stone post;
26. $45^{\circ} 06'$ —1316.90 feet along same to a “†” on square stone post;
27. $17^{\circ} 30'$ —999.30 feet along same to the point of beginning,

Containing an area of 614.38 acres.

LOT II.

Being a portion of Grant 2060 to Joseph Raymond and Louis Bernard, lying on the mauka or North side of Kamehameha Highway, described as follows:

Beginning at a point on the Northwest corner of this lot on the boundary of the lands of Manana and Waiawa, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Ewa Church" being 7675.92 feet North and 5242.67 feet East and being also $249^{\circ} 02'$ 747.8 feet from a certain Triangulation Station, known as "Cane", located in the land of Waiawa and running by true azimuth:

1. $21^{\circ} 43'$ —528.00 feet along the Eastern boundary of the land of Waiawa, being L.C.A. 7713, R.P. 4475, Apana 46 to Victoria Kamamalu;
2. $33^{\circ} 59'$ —4546.00 feet along same;
3. $08^{\circ} 14'$ —726.00 feet along same;
4. $08^{\circ} 06'$ —1254.00 feet along same;
5. $311^{\circ} 41'$ —787.25 feet along L.C.A. 7713, R.P. 4475, Apana 48 to Victoria Kamamalu to a point on the mauka or Northeast side of Kamehameha Highway, new alignment;
6. $290^{\circ} 19' 30''$ —95.20 feet along said Kamehameha Highway;
7. $202^{\circ} 00'$ —526.00 feet along portion of Grant 2060 and along Pearl City Municipal Park;
8. $292^{\circ} 00'$ —440.00 feet along mauka boundary of said Municipal Park;

9. $202^{\circ} 00'$ —225.00 feet along portion of Grant 2060 along an excavated area;
10. $292^{\circ} 00'$ —70.00 feet along same to a point 25 feet from the center line of Waimano Home Road;
11. $202^{\circ} 00'$ —6815.00 feet along the Western side of said Waimano Home Road (Right-of-way being 50 feet wide);
12. $197^{\circ} 15'$ —250.00 feet along same;
13. $54^{\circ} 30'$ —570 feet along edge of a steep pali, overlooking Waiawa Gulch on the Northwest;
14. $94^{\circ} 26' 30''$ —579.15 feet along same to the point of beginning,

Containing a gross area of 221.74 acres, excepting and reserving therefrom the City and County Reservoir site, described as follows:

Beginning at a point on the Northeast corner of this lot, the coordinates of said point being 2501.80 feet North and 3418.00 feet East from a Government Survey Triangulation Station "Ewa Church", and running by true azimuth:

1. $22^{\circ} 00'$ —101.00 feet along an irrigation ditch;
2. $51^{\circ} 20'$ —170.00 feet along cane field;
3. $141^{\circ} 20'$ —170.00 feet along same;
4. $202^{\circ} 00'$ —165.95 feet along same to a road;
5. $292^{\circ} 00'$ —231.45 feet along said road to the point of beginning,

Containing an area of 45,346 square feet or 1.04 acres more or less.

SUMMARY

Lot I—Area	614.38 Acres
Lot II—Area.....	221.74 Acres
<hr/>	
Total	836.12 Acres
Less Exclusion	1.04 Acres
<hr/>	
Net Area	835.08 Acres

Subject also to an easement for two pipe line rights of way from the City and County Reservoir Site, one pipe line running in a Southeasterly direction to Waiamano Home Road and one running in a Southerly direction to the Municipal Park, both easements being in favor of the City and County of Honolulu, as granted by the Oahu Railway and Land Company by deed dated July 25, 1932, recorded in the office of the Registrar of Conveyances in Honolulu in Book 1174 Page 82.

Together with all the buildings and improvements thereon.

Excepting and Always Reserving out of this demise:

(a) The pole and wire lines of the Hawaiian Electric Company, Limited, as shall, at the commencement of the term of this lease, have been constructed over and across portions of the land hereby demised, together with all rights appurtenant thereto;

(b) All lands which the Lessor may require or deem necessary or desirable as rights-of-way for pole and wire lines of all kinds to be constructed and maintained by it or its assigns (either in ad-

dition to or in substitution for any existing pole and wire lines) upon, over or across the lands hereby demised from any point or points in any direction, including all reasonable right of entry upon the demised premises for the construction, repair and maintenance of the same in efficient use and condition; it being understood and agreed that the Lessor's rights in this respect will be exercised in such manner as to occasion the Lessee the least possible interference with its use of the demised premises;

(c) The right unto the Lessor, its licensees and its tenants and lessees of adjoining and neighboring lands reasonably to use, in common with the Lessee, the road beginning at West side of Wai-mano Home Road at 280 foot ditch and passing across Lot 2 hereof, makai of Lessee's reservoir to the Bishop Estate land of Waiawa and thence mauka over said last named land to the Lessor's land mauka of said Lot 2 now existing upon the lands hereby demised and land under the control of the Lessee at the date of execution hereof, it being understood that in the event the Lessee shall deem it advisable to abandon such existing road, it will at its own expense, if so requested by the Lessor, provide an equally convenient and suitable road for the reasonable use by the Lessor, its licensees and its tenants and lessees of adjoining and neighboring lands.

(d) The lands demised by this lease to the extent said lands are withdrawn by the Lessor as hereinafter mutually agreed upon;

(e) The easements and rights-of-way granted to the City and County of Honolulu by the Lessor and Lessee in that certain deed dated July 25, 1932 and recorded in the Bureau of Conveyances of the Territory of Hawaii in Book 1174, Page 82;

(f) A right-of-way and easement over the lands demised hereby, for the installation and maintenance of a pipe-line for the purpose of carrying any water which the Lessor may develop upon any of its lands including the lands demised hereby and withdrawn from the operation hereof, and the right to go upon the lands demised hereby for the purpose of constructing, inspecting, repairing and maintaining said pipe line; Provided, However, that the Lessor shall pay to the Lessee any damages to growing crops which may be occasioned by the erection or maintenance of said pipe-line and provided further that said pipe-line shall be buried at least three feet below the surface; and provided further that the lessor shall have the right to designate the location of such right-of-way and easement at the time it desires to instal said pipe-line.

To Have and To Hold the same unto the Lessee from the first day of July, 1940, for the term of twenty-five and one-half ($25\frac{1}{2}$) years thence next ensuing, subject to said exceptions and reservations, the Lessee yielding and paying therefor yearly and every year during the said term unto the Lessor rent as follows:

A. Minimum Rental. All minimum rent shall be payable in two equal payments, each in advance

on the 1st day of January and the 1st day of July in each and every year during the continuance of this lease, without any deduction, the first of such payments to be made on the 1st day of July, 1940, and the minimum rent for the first half year and each calendar year thereafter for the land under each classification shall be at a rate determined as follows:

1. Sugar Cane Lands. The minimum rent for the land hereby demised which is classified as "Sugar Cane Lands" and which comprises 791.80 acres, including 51.28 acres, more or less, of land contributory to such cane land, such as field roads, ditches, reservoirs, railroads, stables and camp sites, shall be \$11,877.00 per annum; said minimum rent shall be decreased for the remainder of the term at the rate of Fifteen Dollars (\$15) per acre per annum for each acre of "Sugar Cane Lands" which may be required, taken or condemned for road or other public purposes or in respect to which the Lessor is unable to maintain the Lessee in peaceable possession or which may be withdrawn from this lease as hereinafter provided and the Lessor shall refund to the Lessee the unearned portion, if any, of the semi-annual installment of the rent which shall have been paid in advance;

2. Waste Lands. No minimum rent shall be paid for the land hereby demised which is classified as "Waste Lands" representing forty-three and 28/100 (43.28) acres.

B. Percentage Rental. The percentage rent for the first half year and for each calendar year

thereafter for the lands hereby demised shall be determined by ascertaining the sum, in cash, of the following:

1. Five percentum (5%) of the gross value of ninety-six degrees (96°) centrifugal raw sugar or its equivalent produced during said half year and each calendar year thereafter from cane grown on the lands hereby demised, valued at the full New York market price, Hawaiian basis, of ninety-six degrees (96°) centrifugal raw sugar (at present officially reported from time to time by the Hawaiian Sugar Planters' Association, and in case such official reports are discontinued, such other base price as may be mutually agreed upon or as may be determined by means of arbitration as is hereinafter provided) or its equivalent average for each day, including Sundays and holidays, for the period of said half year and each calendar year thereafter, without any deduction, to which shall be added any bounties, benefit payments or refunds received by the Lessee on account of sugar produced during said half year and each calendar year thereafter in addition to the amount received by the Lessee on account of the sale of sugar;

2. Five percentum (5%) of the gross proceeds, without any deduction, received by the Lessee from the sale of each form of by-product of sugar or sugar cane produced during the term of this lease by the Lessee from cane grown on the lands hereby demised during said half year and every calendar year thereafter.

3. Five percentum (5%) of the gross proceeds,

without any deduction, received by the Lessee from the sale of products and by-products of any kind, other than of sugar or sugar cane, produced or derived from the lands hereby demised during the said half year and each calendar year thereafter;

4. It is understood that in the event the Lessee shall after December 31, 1965 receive proceeds from sales of 96° centrifugal raw sugar or its equivalent or any form of by-products of sugar or sugar cane produced from cane grown on the demised premises during the term hereof or shall receive proceeds from the sale of products and by-products of any kind whatsoever other than sugar or sugar cane produced or derived from the demised premises during the term of this lease, the Lessor shall receive 5% of such gross proceeds;

The amount of the percentage rent payable for the lands hereby demised shall be the amount, if any, by which the percentage rent for the lands hereby demised for said half year and each calendar year thereafter exceeds the minimum rent for the lands hereby demised for said half year and each calendar year thereafter, and such amount shall be paid by the Lessee to the Lessor within thirty (30) days after the end of said half year and each calendar year thereafter; provided, however, that the Lessee may estimate the amount of rent due in case final figures are not available within said thirty days; such estimated amounts and rent paid in accordance therewith shall be subject to adjustment when final figures are obtainable.

And the Lessor hereby covenants with the Lessee, that upon payment by the Lessee of the rent as aforesaid and upon observance and performance of the covenants by the Lessee hereinafter contained, the Lessee shall peaceably hold and enjoy the premises hereby demised for the said term without hindrance or interruption by the Lessor or any other person or persons lawfully or equitably claiming by, through or under it;

And the Lessee hereby covenants with the Lessor as follows:

That it (the Lessee) will pay the said rent in legal tender of the United States at the office of the Lessor in Honolulu, in manner aforesaid, without any notice or demand;

That it will also pay, when and as the same become due and payable, all taxes, rates, assessments, impositions, duties, charges and other outgoings of every description to which the demised premises or the Lessor or Lessee in respect thereof are on July 1, 1940, or may during the said term become liable, and whether the said taxes, rates, assessments, impositions, duties, charges and other outgoings are or shall be assessed to or be payable or dischargeable by law by either the Lessor or Lessee, including all assessments or charges for any permanent benefit or improvement of the premises hereby demised or any part thereof, made under any betterment law or otherwise, or any assessments or charges for sewerage or street or sidewalk improvement or municipal or other charges which may be legally imposed upon the

said premises, or to which the said premises or any part thereof or the Lessor or Lessee in respect thereof are on July 1, 1940, or may during the said term become liable, Provided, However, that if any of said assessments or charges are payable in annual installments the Lessee may elect to pay the same by installments and shall only be required to pay only those installments which may become due and payable during the term of this lease.

That if any assessments or charges for any permanent benefit or improvement initiated by the Lessor are assessed against the premises herein demised or are occasioned by virtue of a subdivision initiated by the Lessor on lands which the Lessor may, under the terms of this lease, withdraw from the operation hereof from time to time, such assessment shall be paid by the Lessor.

That it will, at its own expense, during the whole of the said term, make, build, maintain and repair all fences, sewers, drains and roads which may be required by law to be made, built, maintained and repaired upon or in connection with or for the use of the said premises or any part thereof; and also build all fences which, in the judgment of the Lessor, may be necessary to protect the reversion in any manner, and also such as may be necessary to prevent cattle, horses and other grazing animals from straying from the lands hereby demised onto adjoining lands:

That it will, at its own expense, during the whole of the said term, well and substantially repair, maintain, amend and keep all buildings, reservoirs,

dams, ditches, tunnels, flumes, water-courses, wells and other improvements and boundary monuments now or hereafter built, made or constructed on the lands hereby demised and all necessary reparations and amendments whatsoever in good order and condition, (excepting however, such improvements and buildings as are of no value whatsoever to the interest of the Lessor and such as have been destroyed or irreparably damaged by act of God or the public enemy), and also, at its own expense, during the whole of said term rebuild any and all buildings that may be destroyed by fire within a reasonable time after such destruction, unless any building so destroyed was of no value to the interest of the Lessor;

That it will permit the Lessor and its agents, at all reasonable times during the said term, to enter the demised premises and examine the state of repair and condition thereof and will repair and make good all defects of which notice shall have been given by the Lessor or its agents with prompt expedition after the receipt of such notice;

That it will during the whole of said term keep the demised premises in a strictly clean and sanitary condition and observe and perform all the laws, ordinances, rules and regulations relating to health and sanitation for the time being applicable in the premises, and will indemnify the Lessor against all actions, suits, damages and claims by whomsoever brought or made by reason of the non-observance or non-performance of such laws, ordinances, rules and regulations or of this covenant;

That the Lessee will neither bore nor drill for water on the demised premises nor in any other way whatsoever endeavor to develop water thereon without first obtaining the written consent of the Lessor;

That it will also, as soon as is reasonably practicable after the end of each calendar year during the term of this lease, furnish the Lessor a full and complete written report (in duplicate) which shall show: (1) the acreage of cane harvested during such year on the demised premises segregated as to plantation fields, and specifying the respective tonnages of cane and raw sugar, the amount of body cane cut for seed, the crop cycles and the age of cane at the time of harvest, in months, for each of such fields, together with the list of areas by fields planned to be harvested during the then ensuing calendar year; (2) the total tonnage of raw sugar produced during the preceding calendar year by the Lessee from cane grown on all land controlled by the Lessee; and (3) the quantities of each form of by-product of sugar or sugar cane produced during the preceding calendar year by the Lessee from cane grown on the demised premises, together with the quantity sold, amounts of gross proceeds received, the year during which such by-products were produced and the quantities remaining unsold at the close of such preceding year;

That it will also, as soon as is reasonably practicable after the end of each calendar year during the term of this lease, furnish the Lessor a full

and complete written report (in duplicate) which shall show the quantities of each form of product and by-product, other than sugar and by-products of sugar or sugar cane, produced on the demised premises during the term of this lease, and which were sold during such calendar year, together with the amounts of gross proceeds received from the sale of each such other products, and together with the amount of such other products as remain unsold;

That the Lessee will at all times during the usual office hours, permit the Lessor or its authorized agents and employees to have free access to all of its books of account, contracts and papers relative to the business carried on by it in respect of the premises hereby demised in so far as such books of account, contracts and papers shall pertain directly to the determination of the amount of gross proceeds hereinabove mentioned and to examine the same and make copies thereof or any part thereof, and generally to take and use such reasonable means as the Lessor shall deem fit for ascertaining that the accounts furnished by the Lessee are full and accurate and that the Lessee is otherwise faithfully carrying out the covenants herein contained and on its part to be observed and performed; and that it will furnish the Lessor henceforth with copies of the detailed annual reports for each year which are submitted by the Lessee to its stockholders;

That it will not make or suffer any strip or waste or unlawful, improper or offensive use of

the premises demised hereby, nor, without the consent in writing of the Lessor, mortgage or assign this lease, nor sublet or part of the possession of the whole or any part of the said demised premises, but the Lessor shall not be required to give such consent without such readjustment in rental as it may require;

That in the use of the demised premises for the planting and cultivating of sugar cane, the Lessee will follow such use in accordance with the standards of good husbandry and approved practices then prevailing in the sugar industry in the Territory of Hawaii, and in the use of the demised premises for any other purpose whatsoever, the Lessee will follow the best of generally approved methods, and in pursuance of these provisions and in the exercise of such use the Lessee shall, by proper construction and use of drainage ditches and otherwise, take all reasonable precautions to prevent or arrest loss of soil by erosion, to the end that the rent payable under this lease shall be as large as might reasonably be expected; and will continue to do so during the continuance of this lease, with all reasonable skill, care, prudence and diligence, so long as it can be done with reasonable profit to the Lessee, it being understood, however, that in no event except as hereinbefore provided, shall this covenant be construed to diminish the minimum rent as hereinbefore provided.

That, in the event the Lessee is required to discontinue or temporarily curtail cane cultivation on land controlled by it, due to Governmental restric-

tions or in order that the Lessee may receive benefits from any general crop reduction program initiated by the Government or by an association of growers, it will not discontinue nor temporarily curtail the cultivation of cane on the demised premises in a greater ratio to the required total curtailment than the ratio the cane area cultivated on the demised premises bears to the total cane cultivated area by the Lessee;

That the Lessee will not cut sugar cane stalks, other than tops, for body cane seed purposes on the lands hereby demised in a greater ratio to the entire amount of sugar cane stalks cut for body cane seed purposes on all of the lands cultivated by the Lessee than the area of the demised premises bears to all of the lands cultivated by the Lessee;

That in the event the Lessor shall bring and sustain an action against the Lessee for breach of any covenant or condition herein contained or for the recovery of possession of the demised premises, the Lessee will pay to the Lessor all costs and expenses incurred by it in such action, including a reasonable attorney's fee;

That at the expiration of said term or sooner determination of this lease, or upon withdrawal of lands by the Lessor as hereinafter provided, it will peaceably surrender and deliver up to the Lessor possession of the lands hereby demised or withdrawn, together with all erections and improvements upon or belonging to the same by whomsoever made, in good repair, order and condition, except such as are of no value to the in-

terest of the Lessor and such as have been destroyed or irreparably damaged by an act of God or the public enemy;

It Is Mutually Understood and Agreed by the parties hereto as follows:

(a) That in the event the demised premises or any part thereof shall be required, taken or condemned for any public use, then, in every such case, the estate and interest of the Lessee in the part of the premises taken shall at once cease and determine, and the Lessee shall not by reason of such taking be entitled to any claim either against the Lessor or others for compensation or indemnity for the taking of any land or water, or any improvements as shall have been made prior to the date of the execution of this lease, and all compensation payable or to be paid by reason thereof shall be payable to and be the sole property of the Lessor, and the Lessee shall have no interest in or claim to such compensation or any part thereof whatsoever, provided, however, and it is hereby agreed that such compensation as shall represent the value of any growing crops and cane stools shall be payable to and be the sole property of the Lessee, less Lessor's percentage rental interest therein; and such compensation as shall represent the value of any improvements or buildings made or constructed after the date of the execution of this lease shall be divided between the Lessor and the Lessee as their interests shall appear, dependent upon the then unexpired term of the lease; and it is further agreed that if such taking shall

so affect the remaining premises held by the Lessee under this lease, or so affect the operation of the Lessee's remaining lands and tenancies, or the business being conducted thereon as to cause substantial damage to the Lessee, then and in that event the Lessee shall have the right to present and pursue its claim for damages and be compensated therefor so long as such action or the payment of such damages shall not affect nor diminish the compensation payable to the Lessor upon condemnation as provided for in this lease.

(b) That the term "by-product of sugar or sugar cane" as used herein shall mean any product which remains over in the cultivation of sugar cane or the manufacture of sugar, and which possesses an actual or potential value of its own in the form in which it remains over, and the term "product other than sugar cane or sugar" as used herein shall mean any product which is produced on the demised premises other than water and sugar cane and which possesses an actual or potential value of its own;

(c) That the Lessee shall not sell any product derived from the processing in whole or in part of a by-product of sugar or sugar cane, nor any product or by-product derived from the processing in whole or in part of a product or by-product other than sugar cane or sugar, without first obtaining from the Lessor written permission so to do, and agreeing with the Lessor upon the method by which the percentage rental with respect thereto shall be calculated;

(d) That the Lessor shall have the right to withdraw from the operation of this lease at such time or times as it may elect such area or areas as it in its sole discretion may select of the portion of the demised premises outlined in red on map hereto attached and made a part hereof, such withdrawals not to exceed in the aggregate a total of 200 acres, and to be progressively from the New Kamehameha Highway mauka in contiguous parcels on either or both sides of the Waimano Home road running mauka from the New Kamehameha Highway through the above mentioned portion of the demised premises and such withdrawals to consist of strips running from said Waimano Home road, (or where the red line does not follow the boundaries of Waimano Home road, from the outside of the red line which is approximately parallel to Waimano Home road) across either or both portions of the demised premises on each side of the Waimano Home road to the outside of the red line outlining said boundary as aforesaid, the mauka boundaries of said strips to be approximately parallel to Kamehameha Highway.

And the Lessor hereby covenants with the Lessee as follows:

1. That in each instance it will notify the Lessee of its intention to withdraw the land at least six (6) months prior to the date of withdrawal, such notice to be given to the Lessee at its office at Aiea or in Honolulu at the office of its agent, C. Brewer and Company, Limited, and such notice shall specifically set forth the area and description of the

land to be withdrawn; Provided, However, that in case lands are to be withdrawn for the use of constructing a reservoir for the Pearl City Water Works, said lands may be withdrawn upon giving two (2) months' notice;

2. That the Lessor will not withdraw lands for the purpose of cultivating sugar cane or pineapples or knowingly sell or lease lands so withdrawn to third persons for the purpose of cultivating sugar cane or pineapples, but nothing herein contained shall be deemed to require the Lessor to put any restrictive covenants of any nature in any deed, agreement of sale or lease covering lands withdrawn or exact any agreement as to the use of lands withdrawn by any bona fide purchaser or lessee or inquire as to the use to which any bona fide purchaser or lessee intends to put said lands.

3. That the minimum rent payable by the Lessee as hereinbefore provided shall be decreased for the remainder of the term at the rate of Fifteen Dollars (\$15.00) per acre per annum for each acre which may be withdrawn by the Lessor effective the date possession of said land is surrendered pursuant to the terms of the notice of withdrawal, and the Lessor shall refund to the Lessee the unearned portion, if any, of the semi-annual installment of rent which shall have been paid in advance.

4. That it will release the Lessee from all assessments or charges imposed under authority of law and required under the terms of this lease to be paid by the Lessee to the extent that said assessments and charges relate to the areas with-

drawn; the assessments for the year in which the withdrawal is made shall be prorated between the Lessor and Lessee as of the date possession of the land is surrendered pursuant to the terms of the notice of withdrawal;

5. That it will pay to the Lessee in legal tender of the United States, at the office of the Lessor, the following compensation:

(a) The fair and reasonable value of the growing crops and stools in the ground of the land withdrawn by the Lessor at the date possession of said withdrawn premises is surrendered to it by the Lessee pursuant to the notice of withdrawal, less however, the percentage rental interest of the Lessor therein;

(b) The fair leasehold value for the unexpired term, of all buildings and improvements upon the demised premises so withdrawn which were placed thereon by the Lessee subsequent to the date of execution hereof.

(c) That all matters of disagreement that may arise under this lease, which cannot be adjusted by the parties hereto to their mutual satisfaction, including any matter herein left to future mutual agreement, shall be settled by arbitration and at the desire of either party shall be submitted to and determined by three disinterested arbitrators, one to be appointed by each of the parties hereto, and either party may give to the other written notice of a desire to have an arbitration of the matter or matters in dispute and name therein one of the arbitrators, whereupon the other party

shall within ten (10) days after the receipt of such notice, name another arbitrator, and, in case of failure so to do, the party who has named an arbitrator shall have the right to apply to a Circuit Judge of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, requesting him to appoint an arbitrator to represent the party so failing to appoint an arbitrator, and the two arbitrators thus appointed (in either manner) shall select and appoint a third arbitrator, and in the event that the two arbitrators so appointed shall, within ten (10) days after the naming of the second arbitrator, fail to appoint the third arbitrator, either party shall have the right to apply to such judge to appoint such third arbitrator, and the three arbitrators so appointed shall thereupon proceed to determine the matter or matters in question, and the decision of any two of them (including the disposition of the costs of the arbitration) shall be final, conclusive and binding upon both parties, and judgment may be entered upon such award by the Circuit Court of the First Judicial Circuit, unless the same shall be vacated, modified or corrected as provided in Chapter 116, Revised Laws of Hawaii 1935, or as the same may be amended or re-enacted from time to time, the provisions of which said statute shall apply hereto as fully as though incorporated herein;

(f) That in case the Lessor or the Lessee shall be ousted of the possession of any portion or portions of the lands hereby demised heretofore classified as "Sugar Cane Lands" by reason of the suc-

cessful assertion of a paramount title, the minimum rent shall be decreased for the remainder of the term at the rate of Fifteen Dollars (\$15.00) per acre per annum for the said "Sugar Cane Lands" of the possession of which such ouster shall have occurred.

Provided, However, and this demise is upon this condition, that if the Lessee shall fail to pay the said rent or any part thereof within thirty (30) days after the same becomes due, whether the same shall or shall not have been legally demanded, or shall become bankrupt, or shall fail to observe or perform faithfully any of the covenants herein contained and on the part of the Lessee to be observed and performed, or shall abandon the demised premises, the Lessor may at once re-enter the demised premises or any part thereof in the name of the whole, and upon or without such entry, at its option terminate this lease without service of legal process and without prejudice to any other remedy or right of action for arrears of rent or for any preceding or other breach of contract, if, after written notice of any such default or breach of contract shall have been given by the Lessor to the Lessee the Lessee shall have failed within thirty (30) days after the receipt of such written notice to remedy such default or breach of contract or justify its failure so to do to the satisfaction of the Lessor.

And It Is Hereby Expressly Agreed and Declared that the acceptance of rent by the Lessor shall not be deemed to be a waiver by it of any

breach by the Lessee of any covenant herein contained, or of the Lessor's right to terminate this lease for breach of covenant; that the term "premises" wherever it appears herein, includes and shall be deemed or taken to include (except where such meaning would be clearly repugnant to the context) all buildings and improvements, now or at any time hereafter built on the lands hereby demised, and all water arising thereon or appurtenant thereto, and the term "Lessor" in these presents shall include the Lessor, its successors and assigns, and also that the term "Lessee" shall include the Lessee, its successors and permitted assigns.

It Is Further Understood that the term "buildings and improvements", appearing in sub-paragraph (b) of paragraph Five (5) relating to withdrawal by the Lessor of lands from the operation of this lease, appearing on page 19 of this lease, shall be deemed to include all buildings and improvements on lands so withdrawn placed thereon after the date of the execution of this lease, including specifically but without limitation to the generality of the foregoing language, lined and permanent trunk line ditches, flumes, roads, permanent railroad rails, culverts, reservoirs, syphons, fences, and dams; that the term "improvements as shall have been made prior to the date of the execution of this lease", appearing in the condemnation clause on page 15 hereof, shall be deemed to include all improvements and buildings, including specifically but without limitation to the

generality of the foregoing language, lined and permanent trunk line ditches, flumes, roads, culverts, reservoirs, fences and dams as shall have been made or constructed prior to the date of the execution hereof; that the term "improvements or buildings made or constructed after the date of the execution of this lease", appearing in said condemnation clause on page 16 of this lease, shall be deemed to include all improvements or buildings made or constructed after the date of the execution hereof, including specifically but without limitation the generality of the foregoing language, lined and permanent trunk line ditches, flumes, roads, culverts, reservoirs, fences and dams made or constructed after the date of the execution of this lease, it being understood that all compensation payable with respect to all portable railroad rails and ties and appurtenances, permanent railroad rails, and agricultural trade fixtures such as water tanks, pumps, syphons, and removable machinery made or constructed at any time shall be the sole property of the Lessee; that the term "erections and improvements upon or belonging to the same", appearing in the provision with respect to surrender of possession by the Lessee at the end of the term of this lease, or sooner determination thereof, or upon withdrawal, appearing on page 15 hereof, shall be deemed to include all erections and improvements, including specifically but without limitation to the generality of the foregoing language, lined and permanent trunk line ditches, flumes, roads, culverts, reservoirs, fences

and dams but shall not include any portable railroad rails and ties and appurtenances, permanent railroad rails and agricultural trade fixtures, such as water tanks, pumps, syphons, and removable machinery made or constructed at any time.

In Witness Whereof, the Lessor and Lessee have caused these presents to be duly executed in quadruplicate the day and year first above written.

(Corporate Seal.)

OAHU RAILWAY AND LAND
COMPANY,

By /s/ W. F. DILLINGHAM,
Its President.

By /s/ A. W. VAN VALKENBURG,
Its Secretary.

(Corporate Seal.)

HONOLULU PLANTATION
COMPANY,

By /s/ JOHN D. McKEE,
Its President.

By /s/ C. F. JACOBSON,
Its Secretary.

(Duly Acknowledged.)

The original of this document recorded as follows: Territory of Hawaii, Office of Bureau of Conveyances. Received for record this 14th day of Dec., 1937, and recorded in Liber 1415 on pages 73-97, and compared. Signed M. N. Huckestein, Registrar of Conveyances.

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[illegible]

CHAL	31.55 AC
CLYCH	23.
ROADS	79
TOTAL	<u>33.54 AC.</u>

CASE	54 96 AC
DITCH	60
ROADS	1.05
TOTAL	56.61 AC

[illegible]

FIELD NO 9	
CANAL	44.5 AC
DITCH	25 "
ROADS	45 "
TOTAL	<u>44.53 AC</u>

FIELD NO 4	
CANL	6.75 AC
CHCN	.02 "
ROADS	.45 "
TOTAL	5.22 AC.

FIELD 40.13
CAVE 51.07 AC
DITCH 23.0
ROADS 92.0
TRACT 95.0
WATER LOT 75.0
TOTAL 53.52 AC

FILED
JUL 27 1964
FBI - MEMPHIS

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NEW

КАМЕНАМЕНА

HIGHWAY

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HONOLULU PLANTATION EXHIBIT 9-J

(Admitted in Evidence 12-3-46)

Office of the
Assistant Registrar, Land Court
Territory of Hawaii
(Bureau of Conveyances)

Honolulu, Hawaii, December 21, 1937

The attached instrument is a true copy of Document Number 42066-42067, received for registration in this office, Dec. 21, 1937, at 3:22 o'clock p.m., and noted on Certificate of Title Number 11500, and also recorded in the Bureau of Conveyances in Liber 1415 Page 254-283.

Attest:

(Seal) /s/ GEORGE C. KOHA,
Assistant Registrar, Land Court, Territory of
Hawaii.

LEASE

This Indenture, made this 12th day of March, 1937, by and between Bruce Cartwright, Trustee under the Will and of the Estate of Emma Kaleleonalani, deceased, hereinafter called the "Lessor", of the first part, and Honolulu Plantation Company, a California corporation, carrying on business in the Territory of Hawaii, with Post Office address, care C. Brewer and Company, Limited, Box 3470, Honolulu, Hawaii, hereinafter called the "Lessee", of the second part,

Witnesseth:

That the Lessor, in consideration of the rent hereinafter reserved, and of the covenants herein contained and on th part of the Lessee to be observed and performed, and the surrender by the Lessee and the cancellation of the following leases as of December 31, 1936, to-wit:

(1) Lease—Bruce Cartwright, Trustee of the Estate of Queen Emma Kaleleonalani, deceased to Honolulu Sugar Company, dated August 2, 1898, and recorded in the office of the Registrar of Conveyances, in Honolulu, in Book 184, Page 288, which said lease was assigned by Honolulu Sugar Company to Honolulu Plantation Company under date of September 28, 1899, duly recorded in the aforesaid office in Book 202, Page 99;

(2) Lease—Bruce Cartwright, Trustee of the Estate of Queen Emma Kaleleonalani, deceased, to Honolulu Plantation Company, dated September 1, 1908, recorded in the aforesaid office in Book 298, Page 480;

held by the Lessee, does hereby demise and lease unto the Lessee: All the land situate at Halawa, District of Ewa, City and County of Honolulu, Territory of Hawaii, containing an area of 3045.353 acres, being (1) portions of the land set forth and described in Land Court Original Certificate of Title No. 11500 issued to Bruce Cartwright, Trustee under the Will and of the Estate of Emma Kaleleonalani, deceased, as set forth on a plan of said

land filed with Amended Application No. 966 in said Land Court as Lots B and C, having a net area of 1886.783 acres, and (2) all the forest land lying mauka of the land firstly described herein as Lot C, being a portion of R. P. 6717 L. C. Aw. 7712 and 8516B to M. Kekuanaoa and Kamaikui, bounded on the South by the land of Moanalua, on the North by the land of Halawa owned by the Trustees of the Estate of B. P. Bishop, deceased, on the East by the land of Heeia at the crest of the Koolau Range, and on the West by Lot C of the land firstly herein described, containing an area of 1185 acres, more or less.

Classification of net area demised:

1936 Cane (acres): 515.41.

Cane Lands—Contributory (acres): 56.50; Available for cane (acres): 20.4.

Total (acres): 592.31.

Forest Reservation Lands (acres): 1185.

Miscellaneous Lands (acres): 1268.043.

Total area (acres): 3045.353.

said land being more particularly delineated on the plan hereinbefore referred to for all areas except the Forest Reserve land.

Together with all the buildings and improvements thereon, excepting and always reserving out of this demise;

(a) The pole and wire lines of the Hawaiian Electric Company, Limited, as shall, at the commencement of the term of this lease, have been constructed over and across portions of the lands here-

by demised, together with all rights appurtenant thereto;

(b) All lands which the Lessor may require or deem necessary or desirable as rights-of-way for pole and wire lines of all kinds to be constructed and maintained by him or his assigns (either in addition to or in substitution for any existing pole and wire lines) upon, over or across the lands hereby demised from any point or points in any direction, including all reasonable right of entry upon the demised premises for the construction, repair and maintenance of the same in efficient use and condition; it being understood and agreed that the Lessor's rights in this respect will be exercised in such manner as to occasion the Lessee the least possible interference with its use of the demised premises;

(c) The right unto the Lessor reasonably to use, in common with the Lessee, such roads and trails as may exist upon the lands hereby demised;

And subject to that certain agreement entered into by the Lessor with the Board of Agriculture and Forestry of the Territory of Hawaii surrendering to the care, custody and control of said Board for forestry purposes only, the land hereby demised lying within the Forest Reserve, as described on page 2 hereof under paragraph (2) having an area of 1185 acres more or less and which agreement has a termination date of August 13, 1939.

To have and to hold the same unto the Lessee from the first day of January, 1937, for the term of twenty-nine (29) years thence next ensuing, the Lessee yielding and paying therefore yearly and

every year during the said term unto the Lessor rent as follows:

(1) During the first three and one-half ($3\frac{1}{2}$) years of said term rental equivalent to and in the same amount reserved and payable to the Lessor under the aforesaid leases of the lands hereby demised and which are surrendered and cancelled as of December 31, 1936.

(2) During the remaining twenty-five and one-half ($25\frac{1}{2}$) years rent as follows:

A. MINIMUM RENTAL

All annual minimum rent shall be payable in two equal payments, each in advance on the first day of January and the first day of July in each and every year during the continuance of this lease, without any deduction, and the minimum rent for the first one-half year and the annual minimum rent for each calendar year thereafter for the land under each classification shall be as follows:

I. CANE LANDS

The minimum rent for the land hereby demised which is classified as "Cane Lands" and which comprises five hundred ninety-two and thirty-one hundredths (592.31) acres, including five hundred fifteen and forty-one hundredths (515.41) acres of land under cane cultivation during 1936, fifty-six and fifty hundredths (56.50) acres of land contributory to such cane land, such as field roads, ditches, reservoirs, railroads, stables, and camp sites, and twenty and forty hundredths (20.40) acres of land

immediately mauka of the 1936 cane lands which is now available for planting shall be Eight Thousand Eight Hundred Eighty-four and 65/100 Dollars (\$8,884.65) per annum, it being understood that the minimum rent for the period from July 1, 1940 to December 31, 1940 shall be Four Thousand Four Hundred Forty-two and 33/100 Dollars (\$4,442.33) payable in advance on July 1, 1940 and the first installment of the annual minimum rental herein provided shall be payable in advance on January 1, 1941. Said minimum rent shall be decreased for the remainder of the term at the rate of Fifteen Dollars (\$15.00) per acre per annum for each acre of "Cane Lands" which may be required, taken or condemned for road or other public purposes or in respect of which the Lessor is unable to maintain the Lessee in peaceable possession, and the Lessor shall refund to the Lessee the unearned portion, if any, of the semi-annual installment of the rent which shall have been paid in advance.

II. FOREST RESERVATION LANDS

No minimum rent shall be paid for the land hereby demised which is classified as "Forest Reservation Lands", comprising One Thousand One Hundred Eighty-five (1185) acres.

III. MISCELLANEOUS LANDS

The minimum rent for the land hereby demised which is classified as "Miscellaneous Lands", comprising twelve hundred sixty-eight and forty-three

thousandths (1268.043) acres, shall be at such rate per acre per annum for each acre thereof used for the growing of sugar cane as shall be determined by the Lessor from time to time, and shall in each instance begin when the planting of sugar cane thereon shall be commenced and shall cease upon the rental due date next succeeding the date on which cultivation thereof shall have ceased.

B. PERCENTAGE RENTAL

The percentage rent for the first one-half year and for each calendar year thereafter for the land under each classification shall be determined by ascertaining the sum, in cash, of the following:

1. Five per centum (5%) of the gross value of the ninety-six degree (96°) centrifugal raw sugar or its equivalent produced during said one-half year and each calendar year thereafter from cane grown on the lands under each classification, valued at the full New York market price, Hawaiian basis, of ninety-six degrees (96°) centrifugal raw sugar (at present officially reported from time to time by the Hawaiian Sugar Planters' Association, and in case such official reports are discontinued, such other base price as may be mutually agreed upon or as may be determined by means of arbitration as is hereinafter provided) or its equivalent averaged for each day, including Sundays and holidays, for the period of said one-half year and each calendar year thereafter, without any deduction, to which shall be added any bounties, benefit payment or refunds received by the Lessee on account of sugar

produced during said one-half year and each calendar year thereafter in addition to the amount received by the Lessee on account of the sale of sugar;

2. Five per centum (5%) of the gross proceeds, without any deduction, received by the Lessee from the sale of each form of by-product of sugar or sugar cane produced from cane grown on the lands hereby demised during said one-half year and each calendar year thereafter;

3. Five per centum (5%) of the gross proceeds, without any deduction, received by the Lessee from the sale of products and by-products of any kind, other than sugar or sugar cane, or by-products of sugar or sugar cane produced or derived from the lands hereby demised during said one-half year and each calendar year thereafter;

It is understood that in the event the Lessee shall after December 31, 1965 produce 96° centrifugal raw sugar or its equivalent from cane grown on the lands under each classification during the term hereof, or receive proceeds from the sale of any form of by-products of sugar or sugar cane produced from cane grown on the demised premises during the term hereof or shall receive proceeds from the sale of products or by-products of any kind whatsoever other than sugar or sugar cane produced or derived from the demised premises during the term of this lease, the Lessor shall receive 5% of the gross value of such 96° centrifugal raw sugar or its equivalent, determined as hereinabove provided, or 5% of such gross proceeds as the case may be;

The amount of the percentage rent payable for the land under each classification shall be the amount, if any, by which the percentage rent for the land under each classification for said one-half year and each calendar year thereafter exceeds the minimum rent for the land under each such classification for said one-half year and each calendar year thereafter, and such amounts shall be paid by the Lessee to the Lessor within thirty (30) days after the end of said one-half year and each calendar year thereafter; provided, however, that the Lessee may estimate the amount of rent due in case final figures are not available within said thirty days; such estimated amounts and rent paid in accordance therewith shall be subject to adjustment when final figures are obtainable.

In addition to the minimum and percentage rental hereinabove provided for, the Lessee shall yield and pay yearly and every year during the said term unto the Lessor the following rentals:

C. BUILDING AND IMPROVEMENT RENTAL

An annual rent of One Hundred Dollars (\$100.) for the use of the buildings and other improvements which were on the demised premises on January 1, 1937, to be paid in two equal payments, each in advance on the first day of July and the first day of January in each and every year during the continuance of this lease, after July 1, 1940, without any deduction, the first of such payments to be made on the first day of July, 1940. In the event

the demised premises or any part thereof shall be required, taken or condemned by any public authority for any public use and by reason of such taking the Lessor shall receive compensation for buildings and improvements which were on the demised premises on January 1, 1937 or which shall have been subsequently thereto rebuilt, reconstructed, or replaced, then the annual rent for the use of the buildings and improvements shall be decreased at the rate of six per centum (6%) of the amount of the compensation so received by the Lessor, but in the event the sum so ascertained exceeds \$100., the Lessee shall not be entitled to any credit whatsoever for such excess.

And the Lessor hereby covenants with the Lessee that, upon payment by the Lessee of the rent as aforesaid and upon observance and performance of the covenants by the Lessee hereinafter contained, and the surrender and cancellation of the leases held by the Lessee as hereinabove mentioned, the Lessee shall peaceably hold and enjoy the premises hereby demised for the said term without hindrance or interruption by the Lessor or any other person or persons lawfully or equitably claiming by, through, or under him; and without limitation upon the general right hereby granted to use the lands hereby demised for any purpose not herein specifically reserved, restricted or denied, the Lessee shall have the right upon all lands hereby demised, including Forest Reservation Lands, to prospect, dig, bore, drill, and tunnel for water, and to build dams, construct pumping stations, and to

dig, excavate and otherwise construct reservoirs thereon for the storage of water, and to dig, lay, bore and construct ditches, pipe lines, water courses, tunnels and flumes thereon for conducting or leading water to the dams and reservoirs;

And the Lessee hereby covenants with the Lessor as follows:

That it (the Lessee) will pay the said rent in lawful currency of the United States at the office of the Lessor in Honolulu, in manner aforesaid, without any notice or demand;

That it will also pay, when and as the same become due and payable, all taxes, rates, assessments, impositions, duties, charges and other outgoings of every description to which the demised premises or the Lessor or Lessee in respect thereof are now, or may during the said term become liable, and whether the said taxes, rates, assessments, impositions, duties, charges and other outgoings are or shall be assessed to or be payable or dischargeable by law by either the Lessor or Lessee, including all assessments or charges for any permanent benefit or improvement of the premises hereby demised or any part thereof, made under any betterment law or otherwise, or any assessments or charges for sewerage or street or sidewalk improvement or municipal or other charges which may be legally imposed upon the said premises, or to which the said premises or any part thereof or the Lessor or Lessee in respect thereof are now or may during the said term become liable; provided, however, that if any such assessments or charges shall be

payable or may be paid in installments, the Lessee may elect to pay the same by installments and shall be required to pay only those installments which may become due and payable during the term of this lease;

That it will, at its own expense, during the whole of the said term, make, build, maintain, and repair all fences, sewers, drains and roads which may be required by law to be made, built, maintained and repaired upon or in connection with or for the use of the said premises or any part thereof; and also build all fences which, in the judgment of the Lessor, may be necessary to protect the reversion in any manner, and such also as may be necessary to prevent cattle, horses, and other grazing animals from straying from the lands hereby demised onto adjoining lands;

That it will, at its own expense, during the whole of the said term, well and substantially repair, maintain, amend and keep all buildings, reservoirs, dams, ditches, tunnels, flumes, water courses, wells and other improvements and boundary monuments now or hereafter built, made or constructed on the lands hereby demised and all necessary reparations and amendments whatsoever in good order and condition (excepting, however, such improvements and buildings as are of no value whatsoever to the interest of the Lessor and such as have been destroyed or irreparably damaged by Act of God or the public enemy); and also, at its own expense, during the whole of said term, rebuild any and all buildings that may be destroyed by fire within a reason-

able time after such destruction, unless any building so destroyed was of no value to the interest of the Lessor;

That it will permit the Lessor and his agents, at all reasonable times during the said term, to enter the demised premises and examine the state of repair and condition thereof and will repair and make good all defects of which notice shall have been given by the Lessor or his agents with prompt expedition after the receipt of such notice.

That it will during the whole of the said term keep the demised premises in a strictly clean and sanitary condition and observe and perform all the laws, ordinances, rules and regulations relating to health and sanitation for the time being applicable in the premises, and will indemnify the Lessor and the estate and effects of the said Emma Kaleleonalani, deceased, against all actions, suits, damages and claims by whomsoever brought or made by reason of the nonobservance or nonperformance of such laws, ordinances, rules and regulations or of this covenant;

That it will plant and complete prior to January 1, 1946, a barrier-forest zone of a width to be determined by mutual agreement and varying with the terrain, using trees and methods of planting satisfactory to the Lessor within and along the makai boundary of the Forest Reservation and will thereafter care for the trees and where necessary to secure a full stand, will replant where trees shall die or be destroyed; and will not cut down, fell or injure, or suffer to be cut down, felled or injured,

such trees within the aforesaid barrier-forest except in making improvement thinnings;

That it will plant and complete the planting prior to January 1, 1946, of timber trees of commercial value of species and also in a manner satisfactory to the Lessor on all areas suitable to timber trees below the Forest Reservation which are not suitable to other crops and which are reasonably accessible for such purpose, such areas to be determined by mutual agreement; and will thereafter care for the trees and where necessary to secure a full stand will replant where trees shall die or be destroyed; and will not cut down, fell or injure, or suffer to be cut down, felled or injured, any trees or saplings now or hereafter growing upon the lands hereby demised, without written permission from the Lessor except in making improvement thinnings and in preparing land for intensive cultivation, the intent of this covenant being to provide for a future supply of mature timber and in making improvement thinnings to furnish the Lessee with fuel, posts, poles, timber and other forest products:

That, except as hereinbefore expressly provided, the Lessee will not use the Forest Reservation Lands herein demised for any other purpose than as Forest Reservation, and will at all times during the said term administer the same in cooperation with Forestry authorities of the Territory of Hawaii for the time being according to the improved methods adapted to a water conserving forest;

That it will, at all times during the said term, foster and encourage the natural reforestation of

the Forest Reservation Lands hereby demised, and in prosecuting any work of developing water thereon and of diverting such water therefrom will take all reasonable and needful precautions to prevent unnecessary injury to the natural or planted forest growth;

That it will, at all times during the said term, take all reasonable precautions to keep cattle, horses and other grazing animals out of the Forest Reservation Lands and to prevent forest fires occurring thereon, and in case such fires shall occur will use all reasonable means at its command or under its control in having such fires speedily extinguished;

That, whenever requested by the Lessor so to do, the Lessee will, within six (6) months from the date of such request, at its own charge and expense, make and thereafter maintain during the whole of the said term such fencing as the Lessor may deem necessary to protect the Forest Reservation Lands hereby demised from the intrusion of cattle, horses, and other grazing animals;

That it will from time to time and at least once each year during the said term, make a careful inspection of the Forest Reservation Lands hereby demised, and will during the month of January in each year (beginning 1942) submit to the Lessor a written report (in duplicate) of the results of such inspection, stating whether or not any animals detrimental to the forest cover or forest lands, or evidence thereof, or any other damage to or improper use of said forest cover or forest lands,

were observed, and reporting on the general condition of the forest cover and the state of repair and condition of any fences erected for the protection of the Forest Reservation Lands;

That it will, in connection with any water investigation, development, construction, extension and operation on the demised lands hereinabove authorized, furnish to the Lessor from time to time, and not less frequently than once each year during the term of this lease, a full and complete report and statement (in duplicate) of all work done, together with copies of all reports, surveys, maps, plans and other records secured in connection with such work; and will also keep, in a manner satisfactory to the Lessor, complete records of the quantity of water developed, if any, and will furnish copies of such records to the Lessor not less frequently than once in each year of the term of this lease, and, in the event that the Lessee shall develop water on lands not herein demised in such a manner that the flow of water therefrom becomes mixed with the water developed on the demised lands, will install and operate adequate water-measuring equipment and will make, keep and furnish the Lessor sufficient gaugings and records accurately to determine the quantity of water developed on the lands hereby demised;

That it will also, as soon as is reasonably practicable after the end of each calendar year during the term of this lease, furnish the Lessor a full and complete written report (in duplicate) which shall show (1) the acreage of cane harvested during

such year on the demised premises segregated as to plantation fields, and further segregated as to "Cane Lands," and "Miscellaneous Lands," as classified hereinbefore, and specifying the respective tonnages of cane and raw sugar, and crop cycles in months, for each of such fields and classified areas, together with a list of areas by fields planned to be harvested during the following calendar year; (2) the total tonnage of raw sugar produced during the preceding calendar year by the Lessee from cane grown on all land controlled by the Lessee; and (3) the quantities of each form of by-product of sugar or sugar cane produced during the preceding calendar year by the Lessee from cane grown on the demised premises, together with the quantities sold, amounts of gross proceeds received, the year during which such by-products were produced and the quantities remaining unsold at the close of such preceding year;

That it will also, as soon as is reasonably practicable after the end of each calendar year during the term of this lease, furnish the Lessor a full and complete written report (in duplicate) which shall show the quantities of each form of product and by-product, other than sugar or sugar cane or by-products of sugar or sugar cane, produced on the demised premises during the term of this lease, and which were sold during such calendar year, together with the amounts of gross proceeds received from the sale of each such other products;

That in the event that any part or parts of the demised lands at any time or times during the

term of this lease, with the written consent of the Lessor as hereinafter provided, shall be sublet by the Lessee to others for a term at will or at sufferance, or in the event the Lessee shall enter into any cropping agreements with respect to the demised premises or any part thereof, the Lessee will, as soon as is reasonably practicable after the end of each calendar year during the continuance of any such sublease, or cropping agreement, furnish the Lessor with a full and complete written report (in duplicate) which shall show the location and area of each parcel of land so sublet, or made subject to a cropping agreement, together with the term and rent or share reserved;

That the Lessee will at all times during the usual office hours, permit the Lessor or his authorized agents and employees to have free access to all of its books or account, contracts, and papers relative to the business carried on by it in respect of the premises hereby demised in so far as such books of account, contracts and papers shall pertain directly to the determination of the gross value of raw sugar or to the determination of the amount of gross proceeds hereinabove mentioned and to examine the same and make copies thereof or any part thereof, and generally to take and use such reasonable means as the Lessor shall deem fit for ascertaining that the accounts furnished by the Lessee are full and accurate and that the Lessee is otherwise faithfully carrying out the covenants herein contained and on its part to be observed and performed; and that it will furnish the Lessor

henceforth with copies of the detailed annual reports for each year which are submitted by the Lessee to its stockholders;

That it will not make or suffer any strip or waste or unlawful, improper or offensive use of the premises demised herein;

That it will not without the prior consent in writing of the Lessor, mortgage or assign this lease, nor sublet for a term, at will or at sufferance, or in any other manner whatsoever, whether by cropping agreement, or otherwise, part with the possession of the whole or any part of the said demised premises, but the Lessor shall not be required to give such consent without such adjustment in rental as he may require;

That in case any water shall be developed or obtained by digging, boring, drilling, or tunneling on the demised premises, it will lead or conduct such water onto the cultivated areas, and use the same in connection with the operation of the Lessee's business, including the irrigation of sugar cane or other crops, the development of power, the watering of live stock, or for domestic use, and none of such water shall be used on any adjacent land or sold to others before first being brought upon the agricultural lands hereby demised;

That in the use of the demised premises for the planting and cultivating of sugar cane, the Lessee will follow such use in accordance with the standards of good husbandry and approved practices then prevailing in the sugar industry in the Territory of Hawaii, and in the use of the demised premises for

any other purpose whatsoever, the Lessee will follow the best of generally approved methods, and in pursuance of these provisions and in the exercise of such use the Lessee shall, by proper construction and use of drainage ditches and otherwise, take all reasonable precautions to prevent or arrest loss of soil by erosion, to the end that the rent payable under this lease shall be as large as might reasonably be expected; and will continue to do so during the continuance of this lease, with all reasonable skill, care, prudence and diligence, so long as it can be done with reasonable profit to the Lessee; it being understood, however, that in no event, except as hereinbefore provided, shall this covenant be construed to diminish the minimum rent as hereinbefore specified;

That, in the event the Lessee is required to discontinue or temporarily curtail cane cultivation on land controlled by it, due to Governmental restrictions or in order that the Lessee may receive benefits from any general crop reduction program initiated by the Government or by an association of growers, it will not discontinue nor temporarily curtail the cultivation of cane on the demised premises in a greater ratio to the required total curtailment than the ratio the cane area cultivated on the demised premises bears to the total cane area cultivated by the Lessee;

That the Lessee will not, at any time during the said term, on behalf of either itself or others, acquire by purchase or exchange any title in or to any of the kuleanas or other fee simple holdings

within the boundaries of the said demised premises without first notifying the Lessor in writing of its intention so to do and giving him (the Lessor) the first opportunity of acquiring the title in such holdings, provided, however, that in case the Lessor shall elect to acquire the title in such holdings, and does acquire the same, the Lessee shall thereupon be offered the first opportunity of leasing the same at a rent which shall net the Lessor a return of six per centum (6%) on the cost of the holdings thus acquired, for a period of years co-terminus with this lease and upon similar conditions;

That, in the event the Lessor shall bring and sustain an action against the Lessee for breach of any covenant or condition herein contained or for the recovery of possession of the demised premises, the Lessee will pay to the Lessor all costs and expenses incurred by him in such action, including a reasonable attorney's fee;

That it will not quarry any rock on the demised premises without the written consent of the Lessor and that it will not remove any soil from the demised premises; and

That at the end of said term or other sooner determination of this lease, the Lessee will peaceably deliver up to the Lessor possession of the lands hereby demised, together with all erections and improvements upon or belonging to the same, by whomsoever made, in good repair, order and condition, except such as are of no value to the Lessor and such as have been destroyed or irreparably damaged by Act of God or the public enemy.

It Is Mutually Understood and Agreed by the parties hereto as follows:

(a) That in the event the demised premises or any part thereof shall be required, taken or condemned for any public use, then, in every such case, the estate and interest of the Lessee in the part of the premises taken shall at once cease and determine and the Lessee shall not by reason of such taking be entitled to any claim either against the Lessor or others for compensation or indemnity for the taking of any land or water, or any improvements or buildings as shall have been made prior to January 1, 1937, and all compensation payable to or to be paid by reason thereof shall be payable to and be the sole property of the Lessor, and the Lessee shall have no interest in or claim to such compensation or any part thereof whatsoever: provided, however, and it is hereby agreed that such compensation as shall represent the value of any growing crops and cane stools shall be payable to and be the sole property of the Lessee, less Lessor's percentage rental interest therein: and such compensation as shall represent the value of any improvements or buildings made or constructed after January 1, 1937, shall be divided between the Lessor and the Lessee as their interests shall appear, dependent upon the then unexpired term of the lease; and it is further agreed that if such taking shall so affect the remaining premises held by the Lessee under this lease, or so affect the operation of the Lessee's remaining lands and tenancies, or the business being conducted thereon as to cause

substantial damage to the Lessee, then and in that event the Lessee shall have the right to present and pursue its claim for damages and be compensated therefor so long as such action or the payment of such damages shall not affect nor diminish the compensation payable to the Lessor upon condemnation as provided for in this lease.

(b) That the term "by-product of sugar or sugar cane" as used herein shall mean any product which remains over in the cultivation of sugar cane or the manufacture of sugar, and which possesses an actual or potential value of its own in the form in which it remains over; and the term "products and by-products of any kind other than sugar or sugar cane or by-products of sugar or sugar cane" as used herein shall mean any product or by-product which is produced or derived from the demised premises other than water and sugar or sugar cane or by-products of sugar or sugar cane and which possesses an actual or potential value of its own; and that the Lessee shall not sell any product derived from the processing in whole or in part of a by-product of sugar or sugar cane, nor any product or by-product derived from the processing in whole or in part of a product other than sugar cane or sugar without first obtaining from the Lessor written permission so to do, and agreeing with the Lessor upon the method by which the percentage rental with respect thereto shall be calculated;

(c) That all matters of disagreement that may arise under this lease, which cannot be adjusted by the parties hereto to their mutual satisfaction, in-

cluding any matter herein left to future mutual agreement, shall be settled by arbitration and at the desire of either party shall be submitted to and determined by three disinterested arbitrators, one to be appointed by each of the parties hereto, and either party may give to the other written notice of a desire to have an arbitration of the matter or matters in dispute and name therein one of the arbitrators, whereupon the other party shall within ten (10) days after the receipt of such notice, name another arbitrator, and, in case of failure so to do, the party who has named an arbitrator shall have the right to apply to a Circuit Judge of the Circuit Court of the First Circuit of the Territory of Hawaii, requesting him to appoint an arbitrator to represent the party so failing to appoint an arbitrator, and the two arbitrators thus appointed (in either manner) shall select and appoint a third arbitrator, and in the event that the two arbitrators so appointed shall, within ten (10) days after the naming of the second arbitrator fail to appoint the third arbitrator, either party shall have the right to apply to such judge to appoint such third arbitrator, and the three arbitrators so appointed shall thereupon proceed to determine the matter or matters in question, and the decision of any two of them (including the disposition of the costs of the arbitration) shall be final, conclusive and binding upon both parties, and judgment may be entered upon such award by the Circuit Court of the First Circuit unless the same shall be vacated, modified or corrected as provided in Chapter 116, Revised

Laws of Hawaii 1935, or as the same may be amended or reenacted from time to time, the provisions of which said statute shall apply hereto as fully as though incorporated herein;

(d) That in case the Lessor or the Lessee shall be ousted of the possession of any portion or portions of the said "Cane Lands" by reason of the successful assertion of a paramount title, the minimum rent shall be decreased for the remainder of the term at the rate of Fifteen Dollars (\$15.00) per acre per annum for "Cane Lands" of the possession of which such ouster shall have occurred; provided however, that if such ouster shall occur prior to July 1, 1940, such decrease shall only be made from and after July 1, 1940, and if such ouster shall occur after July 1, 1940, such decrease shall be effective from and after the date of such ouster. In the latter case the Lessor shall refund to the Lessee the unearned portion, if any, of the semi-annual installment of the minimum rental which shall have been paid in advance.

(e) That the Lessor shall have the right, up to and including the 30th day of June, 1940, to withdraw from the operation of this lease at such time or times as he may elect, such area or areas as he in his sole discretion may select, of the portion of the demised premises outlined in red on map hereto attached and made a part hereof and marked "Exhibit A," such withdrawals to be progressively from the Puuloa Road and the Oahu Railway and Land Company's main right of way mauka to the new Kamehameha Highway and to consist of strips run-

ning as nearly parallel as is practicable with the said Puuloa Road.

And the Lessor Hereby Covenants With the Lessee as Follows:

1. That in each instance he will notify the Lessee of his intention to withdraw the land at least twelve months prior to the date of withdrawal, such notice to be given to the Lessee at its office at Aiea or in Honolulu at the office of its agent, C. Brewer and Company, Limited, and such notice shall specifically set forth the area and description of the land to be withdrawn, it being the intention hereof that such notice may be given at any time prior to June 30, 1940.

2. That the Lessor will not withdraw lands for the purpose of cultivating sugar cane or knowingly sell or lease lands so withdrawn to third persons for the purpose of cultivating sugar cane or pineapples, but nothing herein contained shall be deemed to require the Lessor to put any restrictive covenants of any nature in any deed, agreement of sale, or lease covering lands withdrawn or exact any agreement as to the use of lands withdrawn by any bona fide purchaser or Lessee or inquire as to the use to which any bona fide purchaser or lessee intends to put said lands.

3. If, pursuant to said notice of withdrawal, possession of said lands so withdrawn is surrendered to the Lessor prior to June 30, 1940, then the minimum rental hereinabove provided for shall be decreased from and after June 30, 1940, for the remainder of the term hereof at the rate of \$15.00

per acre per annum for cane lands surrendered and at such rate per acre per annum as may have been fixed by the Lessor under the terms hereof as a minimum rental for miscellaneous lands used for the growing of sugar cane, but if possession of such lands is not surrendered until after June 30, 1940, then the minimum rental hereinabove provided for shall be decreased from and after such date of surrender for the remainder of the term hereof at the rate of \$15.00 per acre per annum for cane lands surrendered and at such rate per acre per annum as may have been fixed by the Lessor under the terms hereof as a minimum rental for the miscellaneous lands used for the growing of sugar cane, and in the latter case the Lessor shall refund to the Lessee the unearned portion, if any, of the semi-annual installment of minimum rent which has been paid in advance.

4. That he will release the Lessee from all assessments or charges imposed under authority of law and required under the terms of this lease to be paid by the Lessee to the extent that said assessments or charges relate to the areas withdrawn, such release to be effective the date possession of said land is surrendered pursuant to the notice of withdrawal. The assessments or charges for the year in which possession is surrendered as aforesaid shall be pro rated between the Lessor and the Lessee as of the date possession of the land is surrendered pursuant to the terms of the notice of withdrawal.

5. That the Lessee shall have the right to harvest

the cane from the then standing crops on the land surrendered but no ratoons therefrom and shall have the right at its own expense to remove all rails, ties, and pipe lines on the land surrendered. The Lessee shall pay to the Lessor the percentage rental hereinabove provided for the standing crops harvested pursuant hereto.

6. The Lessee shall have the option of surrendering possession of any lands with respect to which the Lessor shall have given the twelve months' notice of withdrawal, at any time prior to the expiration of said twelve months' period and in the event of such surrender the rental, assessments, and charges mentioned in paragraphs 3 and 4 *supra* shall be pro-rated as of the date of such surrender.

Provided, However, and this demise is upon this condition, that if the Lessee shall fail to pay the said rent or any part thereof within thirty (30) days after the same becomes due, whether the same shall or shall not have been legally demanded, or shall become bankrupt, or shall fail to observe or perform faithfully any of the covenants herein contained and on the part of the Lessee to be observed and performed, or shall abandon the demised premises, the Lessor may at once re-enter the demised premises or any part thereof in the name of the whole, and upon or without such entry, at his option terminate this lease without service of legal process and without prejudice to any other remedy or right of action for arrears of rent or for any preceding or other breach of contract, if, after written notice of any such default or breach of contract shall have been given by the Lessor to the Lessee, the

Lessee shall have failed within thirty (30) days after the receipt of such written notice to remedy such default or breach of contract or justify its failure so to do to the satisfaction of the Lessor.

And It Is Hereby Expressly Agreed and Declared that the acceptance of rent by the Lessor shall not be deemed to be a waiver by him of any breach by the Lessee of any covenant herein contained, or of the Lessor's right to terminate this lease for breach of covenant; that the term "Lessor" in these presents shall include the Lessor, his successors in trust and assigns, and also that the term "Lessee" shall include the Lessee, its successors and permitted assigns.

It Is Mutually Understood and Agreed as Follows:

(a) That the term "buildings and improvements thereon" appearing in the clause on page 2 of this lease, reading: "together with all buildings and improvements thereon excepting and always reserving out of this demise," shall be deemed to include all improvements and buildings on said demised premises on January 1, 1937, including specifically but without limitation to the generality of the foregoing language, buildings, lined and permanent trunk lined ditches, flumes, roads, culverts, reservoirs, tunnels, fences and dams and the permanent railroad shown on the blue print hereto attached, marked "Exhibit B" and made a part hereof, together with the appurtenances thereto;

(b) That the term "improvements or buildings as shall have been made prior to January 1, 1937," appearing in the condemnation clause on page 19 hereof, shall be deemed to include all improvements and buildings made or constructed prior to January

1, 1937, including specifically but without limitation to the generality of the foregoing language, buildings, lined and permanent trunk lined ditches, flumes, roads, culverts, reservoirs, tunnels, fences and dams as shall have been made or constructed prior to January 1, 1937, and the permanent railroads shown on said "Exhibit B" hereto attached, and the appurtenances thereto;

(c) That the term "improvements or buildings made or constructed after January 1, 1937," appearing in said condemnation clause on page 20 hereof, shall be deemed to include all improvements or buildings made or constructed after January 1, 1937, including specifically but without limitation to the generality of the foregoing language, buildings, lined and permanent trunk lined ditches, flumes, roads, culverts, reservoirs, tunnels, fences and dams made or constructed after January 1, 1937; it being understood that all compensation payable with respect to rails and ties of permanent railroads constructed after January 1, 1937, and with respect to all portable railroad rails and ties and appurtenances and agricultural trade fixtures such as water tanks, pumps, syphons and removable machinery made or constructed at any time, shall be the sole property of the Lessee; and

(d) That the term "erections and improvements upon or belonging to the same" appearing in the provision with respect to the surrender of possession by the Lessee at the end of the term of this lease or sooner determination hereof, appearing on page 19 hereof, shall be deemed to include all erections and improvements, including specifically but

without limitation to the generality of the foregoing language, buildings, lined and permanent trunk lined ditches, flumes, roads, culverts, reservoirs, tunnels, fences and dams and the permanent railroads shown on said "Exhibit B" hereto attached and made a part hereof, and the appurtenances thereto, but shall not include any railroad rails or ties of permanent railroads constructed after January 1, 1937, nor any portable railroad rails and ties or appurtenances nor agricultural trade fixtures such as water tanks, pumps, syphons and removable machinery made or constructed at any time.

In Witness Whereof the Lessor as such Trustee as aforesaid has set his hand, and the Lessee has caused its name and corporate seal to be set by its proper officers hereunto and to three other instruments of the same date and tenor, the day and year first above written.

/s/ BRUCE CARTWRIGHT,

As Trustee under the Will and of the Estate of
Emma Kaleleonalani, deceased.

HONOLULU PLANTATION
COMPANY,

By /s/ JOHN D. McKEE,
Its President.

By /s/ C. F. JACOBSON,
Its Secretary.

(Duly Acknowledged)

The original of this document recorded as follows:
Territory of Hawaii. Office of Bureau of Conveyances. Received for record this 21st day of December, 1937, and recorded in Liber 1415 on pages 254-283, and compared. Signed M. N. Huckestein, Registrar of Conveyances.

U. S. NAVY RESERVATION

B. P. DISHOP ESTATE

7.40 ACES

EMMA KALELEONALANI ESTATE
BRUCE CARTWRIGHT TRUSTEE

MANUALA PLANTATION CO.
RAILROAD

Road

KAMAHAMAHU HIGHWAY

To Honolulu

TRUE NORTH

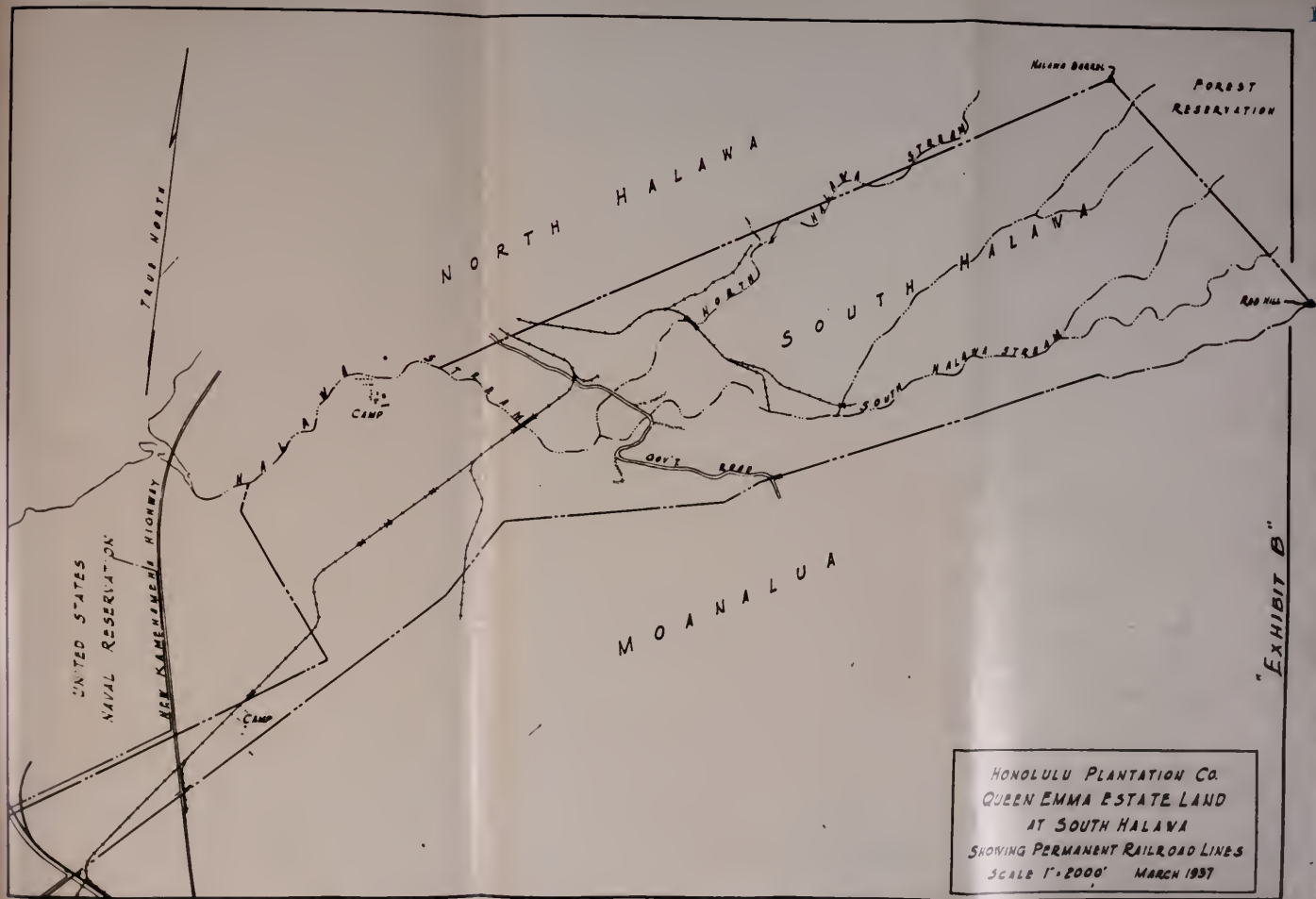
MOANALUA

100 FT. RM. OF C. & N. P. CO.
ROAD
GOVT.

QUEEN EMMA ESTATE LAND
PORTION OF L.C. APP. 966 (AMENDED)

SOUTH HALENIA, EWA, OAHU.

SCALE 1"=300' JAN. 1937



HONOLULU PLANTATION EXHIBIT 9-K

(Admitted 12-3-46)

Bishop Trust Company
Limited

10/21/'40 by P. E. S.

11/29/'40 H.

October 18, 1940

C. Brewer & Co., Ltd.,
Agents, Honolulu Plantation Company,
Honolulu, T. H.

Attention: Mr. P. E. Spalding, Vice-President.

Dear Sirs:

RE: Estate of S. M. Damon

The Trustees of the S. M. Damon Estate are willing to lease to the Honolulu Plantation Company for a term of ten years from the expiration of the present lease, or until December 31, 1953, unless there is an earlier determination of the Trust, the areas as set forth under the terms and conditions specified below:

Land to be leased comprising fields now in cane mauka of Kamehameha Highway and makai of the Highway fields 92 to 94 inclusive. (We understand fields 95 and 96 are going to be taken over by the U.S. Army.) Lease of fields 91 and 107 not to

be renewed and these lands to revert to the Estate at the termination of the present lease on December 31, 1943. Fields 97-A and 97-B, known as the "Gore Lot," to be surrendered to the Estate without cost when the present cane growing on said land is harvested.

The minimum rental to be \$15.00 per acre for lands occupied for plantation purposes. Said rental to increase at the rate of 20c per acre per annum for any increase of \$1.00 in the average price of 96° New York raws about \$50.00, and proportionately for any fraction of an increase of \$1.00, said increase, however, to cease when the price of 96° raws exceeds \$100.00.

The Plantation to pay the property taxes.

If the present Sugar Act is to continue in its present or a similar form, 75% of the Federal payments to be added to the New York basis price to determine the average price of 96° raw sugars which fixes the rental value basis.

All areas not in sugar cane and not used for ditches or railroads may be withdrawn by the Estate's giving sixty days' notice, without penalty to the Estate, including any reduction in rent.

The Damon Estate to have an easement over the roads so as to give proper ingress and egress to the lands mauka of fields 82 to 89, also to have the privilege of laying water pipes along such roads at such times as the fields have just been harvested in order not to interfere with plantation operations.

If these terms are agreeable a formal lease can then be drawn up.

Very truly yours,

/s/ J. WATERHOUSE,
/s/ E. H. WODEHOUSE,
/s/ W. F. FREAR,
/s/ J. E. RUSSELL,

Trustees under the Will of Samuel Mills Damon,
Deceased.

C. Brewer and Company
Limited

October 21st, 1940

This Letter No. 9870-PES

Trustees under the Will of
Samuel Mills Damon, Deceased
c/o Bishop Trust Company, Ltd.
Honolulu, T. H.

Dear Sirs:

RE: Estate of S. M. Damon

We have for acknowledgement your letter of October 18, 1940 containing an offer to lease to the Honolulu Plantation Company certain lands of the Estate of S. M. Damon for a period of ten years commencing January 1, 1944 and terminating December 31, 1953 and under certain conditions.

The terms of your offer are acceptable to Honolulu Plantation Company. We understand that unless Fields 95 and 96, makai of Kamehameha High-

way, are taken over by some Federal authority before the expiration of the current lease, they will be included in the lands to be leased to Honolulu Plantation Company.

We will prepare a tentative form of lease for submission to you.

Very truly yours,

/s/ P. E. SPALDING,

Vice-President, C. Brewer and Company, Limited,
Agents for Honolulu Plantation Company.

(Duplicate)

This Indenture of Lease, made this 27th day of June, 1927, by and between Harriet M. Damon, Henry Holmes, A. W. T. Bottomley, and James L. Cockburn, all of the City and County of Honolulu, Territory of Hawaii, Trustees under the Will and of the Estate of S. M. Damon, deceased, hereinafter called the "Lessors," of the first part, and Honolulu Plantation Company, a California corporation, hereinafter called the "Lessee," of the second part.

Witnesseth:

That the Lessors, in consideration of the rent hereinafter reserved and of the covenants herein contained and on the part of the Lessee to be observed and performed, do hereby demise and lease unto the Lessee:

All those tracts or parcels of land situate within the Ahupuaa of Moanalua, City and County of Honolulu aforesaid, being portions of Apana 2 of the land mentioned or described in Royal Patent 7858,

Land Commission Award 7715 to L. Kamehameha, and more particularly bounded and described as follows:

1.—Lot B. Description of a portion of Ahupuaa of Moanalua, L.C.A. 7715 Royal Patent 7858, Apana 2, to L. Kamehameha.

Beginning at a “+” on a stone at the East corner of this piece on the mauka side of Government Road, the co-ordinates of which referred to Government Survey Triangulation Station “Salt Lake” are 9848.3 feet South and 1965.5 feet East and running by true azimuths,—

Along mauka line of Government Road and fence the direct azimuth and distance being,

1. $59^{\circ} 34'$ —351.4 feet;
2. $86^{\circ} 48'$ —439.0 feet;
3. $98^{\circ} 43'$ —536.2 feet along Government Road and fence;
4. $9^{\circ} 04'$ —21.5 feet to a pipe on the mauka line of O. R. & L. Co.'s 40 foot R. of W.;
5. $99^{\circ} 04'$ —674.0 feet along mauka line of O. R. & L. Co., 40 foot R. of W. to a pipe;
6. $9^{\circ} 04'$ —1233.8 feet along Lot A, passing over a pipe at 64.5 feet on the makai side of Government Road to a pipe on mauka side of plantation road;
7. $67^{\circ} 50'$ —179.3 feet along road and fence;
8. $45^{\circ} 35'$ —61.1 feet crossing road to a point on Waikiki side of gate; Thence along center line of wall, the direct azimuth and distance being,
9. $53^{\circ} 48'$ —228.5 feet;
10. $43^{\circ} 53'$ —394.3 feet;

11. $121^{\circ} 51'$ —804.0 feet;
12. $118^{\circ} 54'$ —257.6 feet;
13. $29^{\circ} 35'$ —340.0 feet;
14. $129^{\circ} 05'$ —139.0 feet;
15. $196^{\circ} 02'$ —230.8 feet;
16. $113^{\circ} 43'$ —210.3 feet;
17. $94^{\circ} 14'$ —449.5 feet;
18. $7^{\circ} 59'$ —334.9 feet;
19. $95^{\circ} 40'$ —345.8 feet;
20. $343^{\circ} 22'$ —137.0 feet;
21. $357^{\circ} 25'$ —460.8 feet;
22. $5^{\circ} 23'$ —262.4 feet;
23. $43^{\circ} 06'$ —233.4 feet;
24. $116^{\circ} 18'$ —433.0 feet;
25. $186^{\circ} 00'$ —360.0 feet;
26. $156^{\circ} 56'$ —590.7 feet;
27. $153^{\circ} 38'$ —180.0 feet;
28. $128^{\circ} 30'$ —220.0 feet;
29. $102^{\circ} 15'$ — 47.5 feet;
30. $189^{\circ} 07'$ —1519.7 feet at 102.7 feet passing over a pipe and along Lot C, to a pipe on the makai side of Puuloa Government Road;
31. $189^{\circ} 04'$ —90.0 feet crossing Government Road, O. R. & L. Co.'s R. of W. to a pipe on the mauka side of R. of W.;
32. $210^{\circ} 10'$ —751.1 feet along Lot C;
33. $216^{\circ} 30'$ —610.0 feet along Lot C, to corner of fence;
34. $295^{\circ} 18'$ — 623.2 feet to corner of fence;
35. $278^{\circ} 21'$ — 197.5 feet along fence;
36. $284^{\circ} 46'$ — 183.4 feet along fence;
37. $275^{\circ} 39'$ —1777.8 feet along fence;

38. $252^{\circ} 43'$ — 384.9 feet along fence;
39. $276^{\circ} 20'$ —1230.0 feet along fence;
40. $348^{\circ} 26'$ — 819.8 feet along fence;
41. $273^{\circ} 14'$ — 74.8 feet along fence;
42. $251^{\circ} 39'$ — 171.5 feet along fence;
43. $275^{\circ} 28'$ — 98.6 feet along fence;
44. $327^{\circ} 00'$ — 496.4 feet along fence to the point of beginning.

Area 295.43 Acres.

2.—Lot C. Being a portion of the Ahupuaa of Moanalua, L.C.A. 7715, Royal Patent 7858, Apana 2, to L. Kamehameha.

Beginning at a “+” on a stone at the Southwest corner of this parcel on the East side of Puuloa Government Road, the co-ordinates of which referred to Government Survey Triangulation Station, “Salt Lake” are South 9796.2 feet South and 13918.8 feet West and running by true azimuths:

1. $227^{\circ} 00' 30''$ —8108.0 feet along highway of Halawa at 4363.0 feet passing over a “+” on a rock on the mauka line of O. R. & L. Co.’s R. of W.;
2. $308^{\circ} 45'$ —338.8 feet;
3. $320^{\circ} 19'$ —184.1 feet;
4. $284^{\circ} 03'$ —656.5 feet;
5. $341^{\circ} 43'$ —169.7 feet;
6. $347^{\circ} 16'$ —582.2 feet;
7. $254^{\circ} 32'$ —297.0 feet to a pipe;
8. $245^{\circ} 09'$ —391.8 feet;
9. $222^{\circ} 35'$ —395.0 feet;
10. $258^{\circ} 05'$ —785.0 feet;
11. $337^{\circ} 55'$ —100.0 feet;

12. $25^{\circ} 00'$ —670.0 feet;
13. $350^{\circ} 50'$ —370.0 feet;
14. $5^{\circ} 37'$ —251.9 feet to a spike;
15. $329^{\circ} 32'$ — 59.9 feet;
16. $299^{\circ} 54'$ —202.1 feet;
17. $9^{\circ} 24'$ —474.5 feet to a pipe; Thence along mauka side of road, the direct azimuth and distance being,
18. $264^{\circ} 03'$ —247.2 feet;
19. $291^{\circ} 32'$ —405.9 feet;
20. $290^{\circ} 43'$ —680.6 feet;
21. $297^{\circ} 41'$ —117.2 feet;
22. $259^{\circ} 13'$ —131.7 feet;
23. $296^{\circ} 15'$ — 85.9 feet to mauka bank of ditch;
24. $328^{\circ} 40'$ —176.0 feet along ditch to fence;
25. $18^{\circ} 56'$ —142.2 feet along fence;
26. $318^{\circ} 34'$ —289.8 feet along fence;
27. $336^{\circ} 56'$ —222.7 feet along fence;
28. $311^{\circ} 14'$ —388.2 feet along fence to corner;
29. $36^{\circ} 30'$ —610.0 feet along Lot B;
30. $30^{\circ} 10'$ —751.1 feet along Lot B to pipe on mauka line of O. R. & L. Co., R. of W.;
31. $9^{\circ} 04'$ —90.0 feet across O. R. & L. Co.'s R. of W. and Puuloa Government Road to a pipe on the makai side of Government Road;
32. $9^{\circ} 07'$ —1417.0 feet along Lot B, to a pipe;
33. $97^{\circ} 24'$ — 185.5 feet along makai side of road;
34. $7^{\circ} 24'$ — 150.7 feet to wall;
35. $40^{\circ} 10'$ — 410.0 feet along wall and fence;
36. $72^{\circ} 43'$ — 299.2 feet along wall and fence;
37. $14^{\circ} 31'$ — 435.3 feet along wall and fence;
38. $49^{\circ} 45'$ — 176.6 feet along wall and fence;

39. 116° 51'— 395.0 feet along wall and fence;
40. 59° 20'— 241.0 feet along wall and fence;
41. 182° 47'— 652.0 feet along wall and fence;
42. 109° 39'— 367.0 feet along wall and fence;
43. 130° 57'— 417.0 feet along wall and fence;
44. 115° 57'— 352.0 feet along wall and fence;
45. 192° 16'— 68.0 feet along wall and fence;
46. 107° 32'— 248.0 feet along wall and fence;
47. 50° 25'— 277.0 feet along wall and fence;
48. 29° 02'— 262.0 feet along wall and fence;
49. 315° 09'— 162.0 feet along wall and fence;
50. 350° 12'— 316.0 feet along wall and fence;
51. 356° 35'— 260.0 feet along wall and fence;
52. 320° 02'— 180.0 feet along wall and fence;
53. 356° 19'— 169.0 feet along wall and fence;
54. 353° 24'— 90.0 feet along wall and fence;
55. 92° 06'— 306.0 feet along wall and fence;
56. 135° 00'— 172.0 feet along wall and fence;
57. 116° 24'— 332.0 feet along wall and fence;
58. 128° 04'— 144.0 feet along wall and fence;
59. 189° 53'— 300.0 feet along wall and fence;
60. 96° 46'— 205.0 feet along wall and fence;
61. 25° 50'— 152.0 feet along wall and fence;
62. 98° 25'— 430.0 feet along wall and fence;
63. 25° 10'— 310.0 feet along wall and fence;
64. 50° 00'— 455.0 feet along wall and fence;
65. 94° 35'— 173.0 feet along wall and fence;
66. 61° 12'— 236.0 feet along wall and fence;
67. 107° 20'— 123.0 feet along wall and fence;
68. 184° 52'— 839.4 feet along fence;
69. 110° 06'— 263.4 feet along fence;
70. 191° 54'— 693.9 feet along waste land;

71. $204^{\circ} 56'$ — 289.4 feet along waste land to a spike;
72. $118^{\circ} 04'$ — 100.0 feet along makai side of road;
73. $50^{\circ} 55'$ — 325.0 feet along waste land;
74. $157^{\circ} 20'$ — 125.0 feet along waste land;
75. $201^{\circ} 55'$ — 221.7 feet along waste land to plantation road;
76. $118^{\circ} 04'$ —1527.6 feet along makai side of plantation road;
77. $68^{\circ} 54'$ —1897.0 feet along waste land to stone wall;
78. $70^{\circ} 25'$ —1342.0 feet along stone wall;
79. $166^{\circ} 10'$ — 545.0 feet along land of Halawa to the point of beginning.

Area 985.83 Acres.

3.—Lot D. Description of a portion of Ahupuaa of Moanalua, L.C.A. 7715, Apana 2, Royal Patent 7858 to L. Kamehameha.

Beginning at the Northwest corner of this lot, on the boundary of Halawa and Moanalua, co-ordinates referred to Government Survey Triangulation Station, "Salt Lake" being 2816.2 feet South and 6451.5 feet West and running by true azimuths:

1. $350^{\circ} 20'$ —470.0 feet parallel to and 6 feet North of pipe;
2. $70^{\circ} 20'$ —708.0 feet along Reservoir Lease;
3. $114^{\circ} 10'$ —112.0 feet along Reservoir Lease;
4. $227^{\circ} 00'$ —955.7 feet along Halawa to the point of beginning.

Area 5.1 Acres

4.—Lot. E. Description of a portion of Ahupuaa of Moanalua, L.C.A. 7715, Royal Patent 7858, Apana 2, to L. Kamehameha.

Beginning at a point on the Easterly side of this lot, said point being 6672.0 feet South and 1422.0 feet West of the Government Survey Station "Salt Lake," and running as follows, by true azimuths:

1. $56^{\circ} 05'$ —208.0 feet along fence;
2. $327^{\circ} 02'$ —550.0 feet along fence;
3. $26^{\circ} 05'$ —257.0 feet along road;
4. $18^{\circ} 12'$ —283.0 feet along road;
5. $43^{\circ} 00'$ —647.0 feet along road;
6. $75^{\circ} 13'$ —350.0 feet;
7. $95^{\circ} 40'$ —445.0 feet;
8. $158^{\circ} 58'$ —228.0 feet;
9. $192^{\circ} 07'$ —164.0 feet;
10. $213^{\circ} 00'$ —104.0 feet;
11. $187^{\circ} 43'$ — 93.0 feet;
12. $163^{\circ} 38'$ —263.0 feet;
13. $192^{\circ} 50'$ —336.0 feet;
14. $225^{\circ} 53'$ —322.0 feet;
15. $215^{\circ} 53'$ —295.0 feet;
16. $226^{\circ} 37'$ —264.0 feet;
17. $262^{\circ} 37'$ —344.0 feet;
18. $155^{\circ} 45'$ —107.0 feet;
19. $124^{\circ} 20'$ —132.0 feet;
20. $97^{\circ} 18'$ —378.0 feet;
21. $110^{\circ} 10'$ —371.0 feet;
22. $161^{\circ} 48'$ —230.0 feet;
23. $167^{\circ} 54'$ —355.0 feet;
24. $180^{\circ} 00'$ —127.0 feet;
25. $202^{\circ} 52'$ —155.0 feet;
26. $191^{\circ} 21'$ —230.0 feet;
27. $187^{\circ} 16'$ —162.00 feet;
28. $204^{\circ} 34'$ —366.0 feet;

29. $162^{\circ} 24'$ —66.0 feet;
30. $246^{\circ} 35'$ —160.0 feet;
31. $316^{\circ} 40'$ —232.0 feet;
32. $278^{\circ} 45'$ —213.0 feet;
33. $255^{\circ} 21'$ —145.0 feet;
34. $233^{\circ} 25'$ —166.0 feet;
35. $222^{\circ} 01'$ —77.0 feet;
36. $207^{\circ} 52'$ —240.0 feet;
37. $227^{\circ} 52'$ —58.0 feet;
38. $222^{\circ} 18'$ —204.0 feet;
39. $211^{\circ} 05'$ —216.0 feet;
40. $217^{\circ} 08'$ —203.0 feet;
41. $291^{\circ} 57'$ —170.0 feet to Salt Lake; thence following the shore of Salt Lake to the initial point, the direct azimuth and distance being, $10^{\circ} 43' 15''$ 3122.7 feet.

Area 96.0 Acres.

5.—Lot F. Portion of L.C.A. 7715, Royal Patent 7858, Apana 2, to L. Kamehameha.

Beginning at a pipe on the makai side of road and Ewa side of ditch from which Government Survey Triangulation Station, "Salt Lake" is by true azimuth $250^{\circ} 29'$ 3764.5 feet and running along left side of ditch the direct azimuth and distances being,

1. $153^{\circ} 15'$ —133.2 feet;
2. $191^{\circ} 44'$ —218.0 feet;
3. $183^{\circ} 43'$ —92.6 feet;
4. $241^{\circ} 23'$ —109.5 feet;
5. $213^{\circ} 50'$ —143.6 feet;
6. $238^{\circ} 28'$ —138.7 feet;
7. $212^{\circ} 50'$ —92.2 feet;
8. $262^{\circ} 07'$ —115.1 feet;

9. $294^{\circ} 01'$ —170.2 feet;
10. $266^{\circ} 37'$ —124.7 feet;
11. $247^{\circ} 46'$ —236.7 feet;
12. $233^{\circ} 11'$ —210.4 feet;
13. $224^{\circ} 14'$ —309.0 feet;
14. $253^{\circ} 06'$ —184.5 feet;
15. $291^{\circ} 22'$ — 67.5 feet;
16. $277^{\circ} 18'$ —169.4 feet;
17. $286^{\circ} 33'$ —105.2 feet;
18. $278^{\circ} 53'$ —105.9 feet;
19. $257^{\circ} 32'$ —140.1 feet;
20. $320^{\circ} 15'$ — 65.0 feet to fence;
21. $24^{\circ} 27'$ —1985.1 feet along fence to makai side of ditch; Thence along makai side of ditch, the direct azimuth and distance being,
22. $119^{\circ} 20'$ —287.6 feet;
23. $113^{\circ} 31'$ —256.5 feet;
24. $92^{\circ} 00'$ — 75.2 feet;
25. $160^{\circ} 10'$ — 82.6 feet;
26. $113^{\circ} 05'$ —244.9 feet;
27. $92^{\circ} 25'$ —185.1 feet;
28. $124^{\circ} 40'$ —224.8 feet;
29. $145^{\circ} 45'$ —206.6 feet to point of beginning.

Area 53.30 Acres.

6.—Lot G. Description of a portion of Ahupuaa of Moanalua, L.C.A. 7715, Royal Patent 7858, Apana 2, to L. Kamehameha, reservoir lot.

Commencing at the South West corner of this lot at a point marked by a stone monument, which bears N. $47^{\circ} 05'$ E. and is distant $154 \frac{1}{3}$ feet from the North East corner of the land described in lease dated August 31st, 1899, and made between

the said S. M. Damon as Lessor and said Honolulu Plantation Company as Lessee, on the boundary between Halawa and Moanalua, the boundary runs thence by true bearings:

1. N. $47^{\circ} 05'$ E.—927.5 feet along said boundary to a point marked by a stone monument, thence
2. S. $65^{\circ} 50'$ E.—126.0 feet to corner of fence.
3. N. $70^{\circ} 20'$ E.—850.0 feet along fence and to a point inside fence,
4. S. $48^{\circ} 37'$ W.—320.0 feet to the corner of fence,
5. S. $63^{\circ} 20'$ E.—400.00 feet to the corner of fence,
6. N. $82^{\circ} 30'$ W.—481.0 feet to the corner of fence,
7. S. $48^{\circ} 00'$ W.—223.0 feet to the corner of fence,
8. S. $14^{\circ} 22'$ E.—423.0 feet to the corner of fence,
9. N. $39^{\circ} 15'$ W.—340.0 feet to the corner of fence,
10. S. $56^{\circ} 50'$ W.—543.0 feet to the corner of fence,
11. S. $57^{\circ} 40'$ E.—520.0 feet to the corner of fence,
12. S. $66^{\circ} 00'$ W.—213.0 feet to the corner of fence,
13. N. $87^{\circ} 30'$ W.—576.0 feet to the corner of fence,
14. N. $23^{\circ} 53'$ W.—432.0 feet to the corner of fence to the point of commencement and containing an

Area of 16.00 Acres,

a little more or less, between the existing line of fence and the Halawa and Moanalua boundary.

The total area hereby demised is 1451.66 acres, of which area 1223.91 acres are or are deemed to be cane lands.

Together with such rights of way, of the nature of easements, for a railway or railways, field roads, flumes, ditches, tunnels, syphons and pipe lines over the adjoining lands of the Lessors as at present ex-

isting and used by the Lessee or such extensions thereof only as it may hereafter be found necessary to construct to install for use in connection with the cultivation and agricultural use of the parcels of land hereby demised, provided always that such hereinabove mentioned existing rights-of-way are used and such extensions thereof are constructed or installed and used so that they will not interfere with any use by the Lessors and their tenants of the adjoining lands of the Lessors and so that all the said above mentioned rights-of-way can be crossed on the level with vehicles at points suitable to the Lessors and that the Lessors and their tenants or tenants of land adjoining the parcels of land hereby demised are held harmless and free and clear of all liability against any claim for damages sustained by the Lessee or its employees, servants or agents by reason of the Lessors or any of them, or any of their said tenants crossing the said hereinabove mentioned rights-of-way by vehicles of any description.

And together with the right to take from the other lands of the Lessors makai of and adjoining the lands hereinabove demised coral, rock and sand for use on the lands hereby demised, so long only as such other lands shall continue to be in the actual occupation of the Lessors, but this right shall not be exercised except in a reasonable manner and so as not to depreciate the use or value of such other lands nor otherwise to cause an injury or trouble to the Lessors.

To Have and to Hold the same unto the Lessee

from and including the first day of January, 1929, for the term of fifteen (15) years thence next ensuing, the Lessee Yielding and Paying therefor yearly and every year during the said term unto the Lessors the rent of Twenty-eight Thousand Six Hundred Eighty-seven Dollars (\$28,687.00) in four (4) equal payments of Seven Thousand One Hundred Seventy-one Dollars and Seventy-five cents (\$7,171.75) each in advance on the first days of January, April, July and October in each and every year during the continuance of this lease, without any deduction, the first of such payments to be made on the first day of January, 1929; Provided, however, and it is hereby agreed, that if it should be found at any time during the term of this demise that the Lessee has planted in cane a larger area of the demised premises than the area of 1223.91 acres, which it represents is cane land, it, the Lessee, shall pay to the Lessors, additional rent for such cane land in excess of 1223.91 acres at the rate of Eighteen Dollars and Fifty Cents (\$18.50) per acre per annum; and at the expiration of this lease the Lessee shall according to the practice of cane cultivation followed in the Island of Oahu, be permitted to continue, but only in regular course of husbandry, the cultivation and harvesting of the then matured or maturing crop of cane on the demised premises until same is fully mature and harvested and shall pay rent for the area of the land so occupied by the Lessee or in use or under its control and until possession thereof is actually surrendered to the Lessors at the rate of \$23.50 per acre per annum;

And the Lessors hereby covenant with the Lessee that upon payment by the Lessee of the rent as aforesaid and upon observance and performance of the covenants by the Lessee hereinafter contained, the Lessee shall peaceably hold and enjoy the said demised premises for the term hereby demised without hindrance or interruption by the Lessors or any other person or persons lawfully or equitably claiming by, through or under them;

And the Lessee hereby covenants with the Lessors as follows:

That it (the Lessee) will pay the said rent in United States gold coin at the office of the Lessors or their agent in Honolulu in manner aforesaid, without any deduction, and without any notice or demand;

That it will also pay all taxes, rates, assessments, impositions, duties and other outgoings of every description to which the said premises or the Lessors or Lessee in respect thereof are now or may hereafter during the said term become liable, and thereafter so long as any of the said premises shall continue in the occupation of the Lessee and become liable, and whether the same taxes, rates, assessments, impositions, duties, charges and other outgoings are or shall be assessed to or be payable by law by either the Lessors or Lessee, including all assessments or charges for any permanent benefit or improvement of the premises hereby demised, or any part thereof made under any betterment law or otherwise or any assessments or charges for sewerage or street or sidewalk improvements or

municipal or other charges which may be legally imposed upon the said premises, or to which the said premises, or any part thereof or the Lessors or Lessee in respect thereof are now or may during the said term become liable;

That it will out of its own moneys during the whole of the said term, make, build, maintain and repair all fences, drains and roads required by law to be made, built, maintained and repaired upon or in connection with or for the use of the said premises or any part thereof;

That it will also out of its own moneys forthwith construct and erect and thereafter during the remainder of the said term, maintain and keep in good repair, a good and substantial fence around the several parcels of land hereby demised and will not impound or cause to be impounded any cattle or horses of the Lessors or of their tenants of adjoining lands that may be found on the said lands hereby demised nor hold the Lessors liable for any damage that may be done by the cattle or horses of said Lessors or their tenants of adjoining lands to the lands hereby demised or to anything thereon;

That it will not make or suffer any strip or waste or unlawful, improper or offensive use of said premises or of any improvements thereon, nor, without the consent of the Lessors in writing mortgage or assign this lease nor sublet nor part with the possession of the whole or any part of the said premises;

That it will use the land hereby demised for cultivation only or in furtherance of the cultivation of

such parcels thereof as shall be suitable for cultivation and, except as herein demised, shall not exercise any rights over any other parts of the Ahupuaa of Moanalua except rights of way over public roads whether such rights are or are not appurtenant to the lands hereby demised;

That it will not sink any additional wells on any land within the boundaries of the Ahupuaa of Moanalua nor use any water raised on or taken or derived from any such land other than it is now entitled to use without the consent in writing of the Lessors first had and obtained;

That it will from time to time and at all times during the said term well and substantially repair, maintain, amend and keep all buildings and improvements now or hereafter to be built on the parcels of land hereby demised with all necessary reparations and amendments whatsoever;

That it will permit the Lessors or their agents at all times during the term hereby demised to enter the said premises and examine the condition thereof, and survey the same;

That it will on the 31st day of December, 1935, or on the 31st day of December, 1940, at the option of the Lessors deliver up to the Lessors peaceable possession of such portion of the tract or parcel of land hereinbefore described as Tract B as may lie or be situate on the makai side of the government road from Honolulu to Puuloa, containing an area of 138.17 acres of cane land, on the Lessors giving to the Lessee not less than 18 months previous notice in writing to surrender the same and on such

surrender the rent hereby reserved shall be reduced to \$26,130.85 per annum for the remainder of the said term of 15 years; and

That at the end of the said term or other sooner determination of this lease, it will peaceably deliver up to the Lessors possession of the said demised premises, together with all erections and improvements upon or belonging to the same by whomsoever made, except buildings and machinery, in good repair, order and condition;

Provided, However, and this demise is upon this condition, that if the Lessee shall fail to pay the said rent or any part thereof within thirty (30) days after the same becomes due, whether the same shall or shall not have been demanded, or shall become bankrupt or go into liquidation, or shall fail faithfully to observe or perform any of the covenants or conditions herein contained and on its part to be observed or performed or shall abandon the said premises, the Lessors may at once re-enter the said demised premises or any part thereof in the name of the whole and at their option terminate this lease without service of notice or legal process and without prejudice to any other remedy or right of action for arrears of rent or for any preceding or other breach of contract;

And it is hereby expressly agreed and declared that the acceptance of rent by the Lessors shall not be deemed to be a waiver by them of any breach by the Lessee of any covenant herein contained, and that the term "Lessors," in these presents shall include the Lessors, their successors in trust and as-

signs, and also that the term "Lessee," shall include the Lessee, its successors and permitted assigns;

In Witness Whereof the Lessors have set their hands and seals and the Lessee has caused its name and corporate seal to be set hereunto and to three other instruments of like date and tenor the day and year first before written.

/s/ HARRIET M. DAMON,

/s/ HENRY HOLMES,

/s/ ALLEN W. T. BOTTOMLEY,

/s/ JAS. L. COCKBURN,

Trustees under the Will and of the Estate of S. M.
Damon, deceased.

HONOLULU PLANTATION
COMPANY,

By /s/ R. A. COOKE,
and /s/ HORACE JOHNSON,
Its Attorney-in-fact.

(Duly Acknowledged)

The original of this document recorded as follows:
Territory of Hawaii, Office of Bureau of Conveyances. Received for record this 1st day of July A. D. 1927 at 2:02 o'clock P.M. and recorded in Liber 888 on pp. 111-124 and compared. (Signed) Carl F. Wikander, Registrar of Conveyances.

HONOLULU PLANTATION EXHIBIT No. 10

(Admitted in Evidence 12-10-46)

MAIN HICKAM FIELD TAKING

Civil Case No.	Owner	Total Ac. in Suit	Acres under control of H. P. Co.			Date Taken June 10/30 Suit filed Feb. 25/35 Judgment filed
			Total	Cane Field No.	Cane by Field	Cane by Owner
289	Main Hickam Field Taking.....	359.17		98	66.50	
	1. Bishop Estate .....	.....		99	86.75	
				100	18.75	
						172.00
	2. Queen Emma	671.556	(old)	97	85.50	
		671.556		101	42.50	
				102	57.00	
				103	84.50	
				104	75.00	
						344.50
	3. Damon Estate	1,176.40		105	50.50	
				106	24.75	
				107 (por.)	46.50	
						121.75
	4. T. of T.	6.0				
	5. C & C of Honolulu.....	2.204				
	6-7. Bishop & Emma (Govt. Rd.)....	9.10				
	8. T. of H.	1.03				
			760 ac.		638.25	638.25
			under H.P. Co. control		Given in answer Civil 289 as 640 ac.	

Land Dept. Dec. 10, 1946

REAL PROPERTY INVENTORY SCHEDULE

January 1, 1945

City and County of Honolulu

	TOTALS				Commercial		Hotel & Apts.		Residential		Agricultural		Miscellaneous	
	Acres	%	Value	%	Acres	Value	Acres	Value	Acres	Value	Acres	Value	Acres	Value
1. B. P. Bishop Est.	57,705.97	14.93	17,511,464	4.29	165.63	4,416,799	85.46	2,582,592	2,024.68	5,980,518	18,313.90	2,127,088	37,177.30	2,384,467
2. Jss. Campbell Est.	51,212.56	13.25	6,052,177	1.48	56.08	1,181,988			571.93	611,709	40,217.52	4,135,304	10,367.03	123,176
3. Malialua Ag. Co.	28,737.01	7.43	2,798,591	.69	1.88	7,543			119.36	30,342	23,118.68	2,755,209	5,497.09	5,497
4. John I. Est. Ltd.	17,027.77	4.40	2,050,597	.50	12.50	74,573			288.91	97,675	9,676.10	1,841,641	7,050.26	36,708
5. H. K. L. Castle	13,977.39	3.62	1,211,030	.30	6.28	50,665			383.97	631,397	6,841.88	464,890	6,745.26	64,078
6. L. L. McCandless Est.	6,255.44	1.62	452,928	.11	3.25	234,343			380.24	108,073	3,524.48	97,537	2,347.47	12,973
7. Waiwae Co.	7,123.76	1.84	236,037	.07	3.69	8,845			154.53	74,655	4,483.35	198,394	2,482.19	14,143
8. Tions Sec. Corp.	6,385.27	1.65	268,296	.07	.57	749			105.27	125,530	3,381.84	119,618	2,877.59	22,399
9. S. M. Dannon Est.	5,302.05	1.37	1,209,718	.30	4.50	82,843			415.85	700,098	4,868.28	346,426	13.42	80,351
10. M. P. Robinson Est.	5,405.10	1.40	1,156,430	.28	5.09	197,682	.90	47,007	5.30	12,076	4,338.29	898,618	1,055.52	1,047
11. Mary E. Foster Est.	4,627.08	1.20	98,318	.02	.08	13,225			23.72	31,935	4,525.06	52,131	78.22	1,027
12. Kuaioa Ranch Ltd.	4,001.25	1.04	292,235	.07					192.07	192,270	839.41	72,154	2,969.77	27,811
13. J. M. Austin Est.	2,903.60	.75	694,763	.17	1.41	611,421				655.94	74,563	2,246.25	8,779	
14. J. P. Mendonca Tr. Est.	2,773.59	.72	527,961	.13	1.33	203,444			209.68	84,220	2,483.13	240,065	79.45	232
15. Geo. Galloway Tr. Est.	2,248.08	.58	466,222	.11						2,000.49	465,969	247.59	247.59	253
16. Kuaioa Land Trust	2,394.91	.62	95,922	.02	1.65	4,295			137.70	25,116	928.19	58,547	1,327.37	7,964
17. Robert Hind Ltd.	2,117.30	.55	194,440	.05					8.54	18,882	306.50	129,901	1,802.26	45,657
18. Hawaiian Aracado Co.	2,115.70	.55	74,190	.02	3.88	2,726			7.95	1,476	2,095.87	69,980	8.00	8
19. Oahu R. & L. Co.	1,735.18	.45	4,752,587	1.17	502.89	4,568,374			103.09	118,577	1,015.74	53,129	113.46	12,507
20. Makaleia R. & L. Co.	2,359.80	.61	160,002	.04					197.85	102,320	2,141.65	97,553	20.30	129
21. Emma Keleleoni	2,716.38	.70	989,370	.24	3.80	496,119	18.99	332,421	1.72	2,066	1,137.55	92,219	1,554.32	66,543
22. Roman Catholic Church	1,467.07	.38	976,957	.24	4.20	207,436			6.02	13,387	1,259.73	50,453	197.12	705,621
23. Sing Chong Co.	1,424.32	.37	66,019	.02					15.32	11,631	900.43	51,337	508.57	3,051
24. Hawaiian Pineapple Co.	991.35	.26	3,542,523	.87	60.69	3,435,166			48.19	96,326	877.12	10,564	5.35	67
25. Charlotte H. L. Cassidy et al	921.15	.24	156,946	.04					25.43	73,409	595.72	74,537	300.00	9,000
26. Haw'ian Land & Imp. Co.	699.00	.18	172,094	.05	2.67	60,141	1.43	5,238	.34	1,213	663.55	101,736	30.81	3,766
27. Chas. W. Lucas Trust	791.71	.20	58,286	.01					4.36	8,550	524.35	45,002	263.00	4,734
28. Mahiwa Water Co.	519.66	.13	145,430	.04	2.41	39,488			63.40	65,927	429.32	38,307	24.53	1,708
S/T 28 Owners	235,940.00	(61.04)	46,471,531	(11.40)	844.00	15,897,925	17.00	2,967,258	5,495.00	9,219,378	142,144.00	14,743,272	87,410.00	3,643,698
All other Taxpayers	47,671.00	12.33	158,184,140	38.79										
Total Taxpayers	283,611.00	(73.37)	204,655,671	(50.19)										
Government Exempt														
Federal	51,890.00	13.42	164,276,284	40.29										
Territorial	50,324.00	13.02	31,448,126	7.71										
County	735.00	.19	7,375,405	1.81										
S/T - Governmente	102,949.00	(26.63)	203,099,815	(49.81)										
GRAND TOTAL	386,560.00	100.00	407,755,486	100.00										

HONOLULU PLANTATION EXHIBIT No. 15

(Admitted in Evidence 1-10-47)

RE: SUGAR CANE ACREAGE

January 1, 1935

Territory	Oahu			
	Acres	%	Acres	%
Fee	122,873	53.00%	5,610	13.26%
Leases	108,971	47.00	36,696	86.74
Total	231,844	100%	42,306	100%

January 1, 1939

Territory	Oahu			
	Acres	%	Acres	%
Fee	126,289	54.14%	5,934	13.60%
Leases	106,982	45.86	37,728	86.40
Total	233,271	100%	43,662	100%

January 1, 1944

Territory	Oahu			
	Acres	%	Acres	%
Fee	123,173	55.90%	5,859	14.86%
Leases	97,141	44.10	33,568	85.14%
Total	220,314	100%	39,427	100%

Tax Office
Honolulu, T. H.
November 20, 1946
C. C. Crozier

HONOLULU PLANTATION EXHIBIT No. 16

(Admitted in Evidence 12-19-46)

HONOLULU PLANTATION COMPANY
SUGAR CANE ACREAGE

January 1, 1935

Fee	146.57 Ac.	2.96%
Leases	4,811.73 Ac.	97.04
<hr/>		<hr/>
Total.....	4,958.30 Ac.	100%

January 1, 1939

Fee	155.01 Ac.	3.05%
Leases	4,929.55 Ac.	96.95
<hr/>		<hr/>
Total.....	5,084.56 Ac.	100%

January 1, 1944

Fee	159.69 Ac.	4.09%
Leases	3,741.30 Ac.	95.91
<hr/>		<hr/>
Total.....	3,900.99 Ac.	100%

Note: Loss of 1,183.573 Ac. of cane 1939 to 1944 or 23.27%.

Tax Office

Honolulu, T. H.

November 20, 1946

C. C. Crozier

HONOLULU PLANTATION EXHIBIT No. 18

(Admitted in Evidence 1-10-47)

C. Brewer and Company, Ltd., Letterhead

This Letter No. 1114-PES

August 21, 1941

Trustees under the Will of
Samuel Mills Damon, Deceased
c/o Bishop Trust Company
Honolulu, T. H.

Gentlemen:

We have for acknowledgment your letter of August 15, 1941.

Since your offer of October 18, 1940 and our acceptance of same on October 21, 1940 Honolulu Plantation Company has proceeded in the operation of the lands to be leased under the full assurance of an undisturbed tenancy until December 31, 1953. In these operations Honolulu Plantation Company has expended substantial sums in the improvement of the property. Several of the fields included in your offer of October 18, 1940 have been taken under governmental condemnation proceedings. Any lease is subject to such a contingency and does not alter the tenancy of the lands remaining.

Your specific offer of October 18, 1940 and our unconditional acceptance of October 21, 1940 constituted a binding agreement which could only be altered by mutual consent. You are therefore advised that your supplementary offer of August 15,

1941 is rejected and that Honolulu Plantation Company will adhere to its full rights as established by the existing agreement.

Yours very truly,

C. BREWER AND COMPANY,
LIMITED,

Agents, Honolulu Plantation
Company,

P. E. SPALDING,
President.

HONOLULU PLANTATION CO. EXHIBIT
NO. 19

(Admitted in Evidence 12/19/46)

79th Congress, 1st Session, House of Representatives. Report No. 1313.

HONOLULU PLANTATION CO.

November 28, 1945.—Committed to the Committee of the Whole House and ordered to be printed.

Mr. Keogh, from the Committee on Claims submitted the following

REPORT

(To accompany H. R. 2688)

The Committee on Claims, to whom was referred the bill (H. R. 2688) to confer jurisdiction upon the United States Court of Claims to hear, determine, and render judgment upon the claim of Honolulu

Plantation Co., having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments are as follows:

Page 1, line 2, after the enacting clause strike out the remainder of the bill and insert in lieu thereof:

That jurisdiction is hereby conferred upon the United States Court of Claims, notwithstanding any prior determination, statute, or decision, to hear, determine, and render judgment upon the claim of Honolulu Plantation Company, a California corporation, for damages to its real property, mill, water system, remaining leaseholds, and other enterprise properties not expropriated by the United States Government, and located on the Island of Oahu in the Territory of Hawaii, for the depreciation in the market value thereof arising out of the expropriations by the United States of divers lands upon which said claimant held leases, in proceedings wherein said lands were condemned in the United States District Court in and for the Territory of Hawaii, and designated as Civil Nos. 416, 430, 434, 436, 442, 452, 514, 525, 529, 533, 535, 544, and 548.

Sec. 2. The damage to be ascertained and adjudged shall be the difference in the fair market value of the fee lands, mill, and other enterprise properties of said claimant as the same existed in 1936, prior to the filing of the aforesaid condemnation suits, and as the same remained in 1945 after the severance and loss of the beneficial use of the said leased lands of said claimant condemned and expropriated by the United States as aforesaid.

Sec. 3. Any suit brought under the provisions of this Act shall be instituted within one year after the date of approval of this Act; and from any decision or judgment rendered in any suit commenced under authority of this Act, a writ of certiorari to the Supreme Court of the United States may be applied for by either party thereto as provided by law in other cases. All testimony adduced before and all documents received by the subcommittee of the Committee on Claims of the House of Representatives shall be competent evidence of said damages and shall be received upon record thereof made before said committee, as fully and to the same extent as though the witnesses were present and without further proof and certification.

Amend the title so as to read:

A bill to confer jurisdiction upon the United States Court of Claims to hear, determine, and render judgment upon the claim of Honolulu Plantation Company.

OBJECT OF THE BILL

The object of the bill is to reimburse the stockholders of the claimant for depreciation in the market value of its real estate and fixtures sustained by reason of the expropriation by the United States of approximately 2,428 acres of land held by the claimant under lease and used in conjunction with its real estate as a unit, which said acquisitions occurred during the period following 1936 and ending January 1, 1945. Each of said leases contained clauses which terminated the rights of the lessee-

claimant upon the filing of condemnation suits by public authority.

At the invitation of the Governor of Hawaii extended through the Delegate to Congress, appropriation for the expenses thereof having been previously made by the Territorial legislature, a subcommittee of this committee, appointed by the chairman, visited Hawaii in October 1945 for the purpose of investigating claims pending before the committee from Hawaii and of hearing testimony on the same from persons resident in said Territory. Among said claims was the instant bill (H. R. 2688) for the relief of Honolulu Plantation Co. Although the majority of stockholders of this company which is organized under the laws of California live in the State of California, the principal assets and business of the company consist of the sugar plantation, mill, and other necessary properties of a plantation operation on the island of Oahu in said Territory. The properties lie adjacent to Pearl Harbor.

INSPECTION OF THE PROPERTY

The committee viewed the property for the damage to which relief has been sought; and also viewed the property formerly held by the claimant on which it had held leases which were canceled by the action of the United States in expropriating the said lands to the use of the Government, in the period following 1936 and concluding January 1, 1945. The committee having viewed all of the property remaining to the claimant, including its mill,

water system, the leased lands remaining to it, and other properties, is of the firm opinion that substantial damage in the depreciation in the market value of the property remaining to and owned by the claimant had been done by reason of the severance of lands held under lease by claimant and on which it had produced the sugar cane to be manufactured into raw and refined sugar in its mill, as well as to its water system, pumping system, and other properties which the committee finds from its examination and the testimony are and were necessary to maintenance and operation of a plantation for the growing sugar cane.

The committee is, however, of the opinion that the detail and proof thereof could be better had and more satisfactorily determined by affording the claimant and opportunity of introducing proof thereon in the Court of Claims and establishing the same by the opinion of experts in the usual manner, for which reason it is recommended that, without reference to any rule of law in relation to the same, that claimant have determined by said court the amount of the depreciation in the value of its remaining property as of 1945 by reason of the severance of the lands formerly held by it under lease, which lands were condemned in proceedings commenced in the United States District Court for the Territory of Hawaii and known as Civil Suits Nos. 416, 430, 434, 436, 442, 452, 514, 525, 529, 533, 544, and 548.

The committee is further of the opinion that the court should have for consideration as evidence the

written record of testimony and the exhibits presented to its subcommittee, for the purpose of adjudicating the damage which the committee finds to have been done.

LAND TENURE IN HAWAII AND BUSINESS PRACTICES

The committee finds that the practice of leasing lands instead of owning them and of building up enterprises with leased lands for the purpose of raising sugar cane was the prevailing practice in the islands.

The committee heard the testimony of the deputy Territorial tax commissioner who is in full charge of real and personal property in the Territory (since 1932) and who had spent some 30 years in the real-estate business in the islands. He had made a complete study of plantations and land tenure in the Territory. The witness presented exhibit 7 which had been prepared at the request of the attorney general of the Territory for the information and use of the Territorial legislature. It showed that 64.4 percent of all of the lands on the island of Oahu (249,023.85 acres) as of January 1, 1944, were held by 28 large landowners. The exhibit also showed that the Territory of Hawaii itself owned a total of 13.205 percent of the lands on said island (51,050.47 acres); that the Federal Government owned a total of 11.796 percent of the lands on said island (45,599.78 acres); and that the balance of 10.58 percent (40,885.9 acres) were the only lands held in private ownership out of a total of

386,560 acres of land on the entire island. The same exhibit also demonstrated that 10 large trusts and estates owned 55 percent of all of the lands on said island.

Table XIV attached to exhibit 1 of the claimant is a list of the landlords of the claimant. It showed that its landlords are (by reference to exhibit 7) among the 10 largest landholders who own 55.31 percent of all of the lands on the island of Oahu.

The witness presented exhibit 6 which showed the percentage relationship between fee holdings and leaseholds on the island of Oahu for the period beginning 1935 and ending 1945. In 1935 the total number of acres of land devoted to sugar cane cultivation on this island was 42,306. Of this total 86.75 percent (36,696 acres) were leased from large landholders and trusts.

In 1945 out of a total of 38,180 acres in sugar cane cultivation, 84.8 percent (32,378 acres) remained in sugar cane cultivation after the Federal takings and were operated under leases by plantation companies conducting their business precisely as that conducted by claimant.

The witness testified that the entire system of land tenure in the Territory was largely one of leaseholds; and on the island of Oahu, he said, that land occupancy was roughly 15 percent fee ownership and 85 percent leases. The witness testified that the relative ownership of lands and the proportion of leases held by the claimant was in accordance with the prevailing business practices in the Territory of Hawaii and particularly on the island of Oahu.

The witness gave the historical background of the establishment of plantations in the Territory and testified that the present system of land ownership and leasing began about 1851, prior to which a division of lands in the Territory had been made by the Government of the then Hawaiian Kingdom. He stated that from the time of annexation, or from about 1900, to date, the land ownership in the Territory had been fundamentally its best investment because of the assured return, and that while many owners have passed out of existence the lands have continued to be held by estates, by their heirs, and by corporations engaged in land holding, and that it is difficult, if not impossible, for any plantation to buy the fee. This, especially since 1900.

NATURE OF DAMAGE

The evidence before this committee is that in excess of \$5,000,000 were invested in this claimant's enterprise, all of which was indispensable to the raising and marketing of sugar cane. That this sum was largely invested in a mill, water and pumping system, and sundry other requirements such as housing for workers, hospital, and the like. All of these were located on fee-owned lands of the claimant which were not devoted to raising sugar cane. This practice and method was followed by the other plantations on the island. Exhibit 8 which was prepared by the deputy Territorial tax assessor was a study of the capital investment of all plantations on the island of Oahu made by that officer after a

study of plantation methods and requirements. It showed that, in addition to the fee value of the lands on which the crops were grown, plantations had an average investment of \$1,023 per acre of arable sugar cane-producing lands, and that actual investment in capital of this claimant in 1939 before any expropriations of leased lands had occurred was \$983 for every acre in production. After the takings the exhibit showed that the investment for the same purpose rose to \$1,512 per acre. This witness testified that, in his opinion, considering the whole of the property before any of the taking and that which remained after the takings, that the remaining lands and property of the claimant had suffered a capital impairment of approximately 40-percent depreciation in value of its remaining properties.

George C. Schmutz, a qualified appraiser, presented a formal written appraisal which is incorporated in exhibit 1. That appraisal, with exhibits attached, appraised the damage before and after the takings to the claimant's remaining properties to be \$3,000,000, after considering the valuation of the property upon the earning basis before and as reduced by the expropriation of leased lands, next upon the excessive capital investment per acre of arable remaining lands, and finally by reference to the public evaluation of the remaining physical properties as evidenced by the quoted price of its stock on the San Francisco Stock Exchange. In 1936, before any expropriations of leased lands, the physical assets of the claimant

were quoted on the market at \$30.12 per share, or a capital value of \$7,530,000, while in 1944 the stock had sunk to \$10.25 per share, or a total value of \$2,562,500. The capital investment of the claimant is 250,000 shares of paid-in capital having a par value of \$20 per share, or \$5,000,000, no part of which has been expropriated by the Government, but it has been severed from arable lands held capable of producing an average of 30,000 to 35,000 tons of cane for grinding in the mill of the claimant each year. Testimony of the operators of the mill and plantation property, as well as the actual inspection of the property by the committee, showed that the property which remained had an overcapacity of fully 50 percent, and, in the opinion of the committee, that its market value has been substantially depreciated by reason of the taking of its leased lands in an amount which should be more accurately ascertained by a determination thereof in the Court of Claims.

THE CLAIMANT HAS RECEIVED NO
COMPENSATION FOR ANY DAMAGE
DONE TO IT

The committee finds that in 1932 614 acres of leased sugar cane lands under lease to this claimant were taken in a proceeding known as No. 289 in the United States District Court for the Territory of Hawaii. The claimant here has asserted no claim for any damage to its remaining properties by reason thereof but has demonstrated the fact that that expropriation reduced the possibility of ad-

justing the operation of the claimant in its enterprise by acquiring other leases when further expropriations occurred. The committee also heard the testimony of the Government appraiser who evaluated the properties which were the subject of this said proceeding and finds that notwithstanding any language in any of the documents filed therein that no allowance was made in appraisal for damage to the fee lands, mill, water system, and other properties of this claimant remaining to it after the severance of these leased lands from its enterprise; and the committee finds that the remaining properties were at no time appraised for the purpose of determining the same by the Government appraisers.

The committee further finds that notwithstanding any language appearing in the stipulation, exhibit 2, and the judgment, exhibit 3, in Civil Suits Nos. 416, 430, 434, 436, and 452, that nothing was allowed or considered for damage to the remaining properties of the claimant for the depreciation in the value of its remaining properties. The committee heard the testimony of the appraiser who evaluated said lands for the Government in said proceedings, as well as the Government attorney who negotiated the settlement referred to in a stipulation, exhibit 2, between the United States and claimant in the aforesaid proceedings. The Government attorney identified the data, computations, and formula (exhibit 13), upon which the amount paid the claimant on a judgment (exhibit 3) entered pursuant to said stipulation. He stated there

the moneys paid were only for growing crops, tools, improvements, a portion of compliance payments which would have been received by claimant had said crops matured to harvest, and that the only other item considered was a "trade" made to effect a compromise on overhead by allowing claimant a portion of the overhead to which it asserted it had committed itself in order to raise to maturity the crops expropriated, to wit: Insurance, taxes, foremen's salaries, and items of similar nature which the claimant was required to pay and which the taking of the crops necessitated its paying although no value was derived therefrom. The Government appraiser testified that he never considered under his contract any depreciation in the value of the claimant's remaining properties but confined his consideration to the actual lands taken and the improvements thereon.

Although a stipulation for the value of growing crops has been entered into between the United States and the claimant in proceedings known as Civil Nos. 514, 525, 529, 533, 535, 544, and 548, it is clear that from this stipulation no payment has been made for the depreciation in the properties of the claimant remaining to it after the condemnation of the fee to the lands under lease to claimant and referred to in these suits.

The committee is of the opinion that the indisputable proof is that the Government has never awarded the claimant anything for the damages for which this claim has been presented.

The committee further finds that each of the

leases upon the lands referred to in all of the aforesaid condemnation suits contained identical clauses inserted on the insistence of the lessors and which clause terminated the lessee's interest in any lands leased upon condemnation thereof. Thus the claimant had no recourse but to appeal to Congress since its fee property was not actually expropriated.

SUMMARY

The committee finds:

1. That the claimant conducted its business according to the accepted and long-established business customs in the Territory of Hawaii but is without legal remedy because of the termination of its contractual rights under the terms of its leases which were drawn in accordance with standards of business prevailing in Hawaii.

2. That no compensation has ever been awarded or considered for the damage for which this relief has been sought.

3. That by reason of the extensive expropriation, by the Federal Government, of lands upon which the claimant held leases, the physical properties of the claimant remaining to it after such severance have been depreciated in market value between 1936, before the expropriations, and 1945, when the last of said expropriations occurred, to an extent which this committee feels is substantial and which it recommends be heard and determined by judgment of the Court of Claims.

4. That no precedent will be established by

granting the relief here sought since it is the opinion it could only have occurred in the Territory of Hawaii because of the nature of the land holdings prevailing in the Territory.

For all of these reasons your committee having viewed the property, examined witnesses, and considered the matter at length recommends that the bill, as amended, do pass.

Office of the Attorney General,
Washington, D. C., July 12, 1945.

Hon. Dan R. McGehee,
Chairman, Committee on Claims,
House of Representatives, Washington, D. C.

My Dear Mr. Congressman: This will refer to your request for my views with respect to a bill (H. R. 2688) to provide compensation to Honolulu Plantation Co., a California corporation, as compensation for damages sustained.

The bill would direct payment to the Honolulu Plantation Co., a California corporation, of the sum of \$3,250,000 as compensation for damages and loss of property sustained by the company by reason of the expropriation by the United States of lands held under leases owned and operated by the company.

The bill does not set forth the grounds upon which the claim is based except in very general terms. From the information available in this Department, however, it appears that properties of the Honolulu Plantation Co. were involved in a number of condemnation proceedings instituted on

behalf of the United States. Most of these proceedings have been concluded by stipulation or voluntary settlement with the Honolulu Plantation Co., accepting the compensation to be paid as complete satisfaction of its claim for just compensation for the property taken.

The compensation to be paid to the Honolulu Plantation Co. for the taking of its property was fixed by judgments entered pursuant to stipulations or agreements with the claimant. There does not appear to be any legal or moral obligation to pay any additional compensation.

In the light of the foregoing circumstances I am unable to recommend enactment of the bill.

I have been advised by the Director of the Bureau of the Budget that there would be no objection to the submission of this report.

Sincerely yours,

TOM C. CLARK,
Attorney General.

The Secretary of the Navy,
Washington, July 20, 1945.

Hon. Dan R. McGehee,
Chairman of the Committee on Claims,
House of Representatives.

My Dear Mr. Chairman: The bill H. R. 2688 to provide compensation to Honolulu Plantation Co., a California corporation, as compensation for damages sustained, was referred by your committee to the Navy Department with request for a report thereon.

The purpose of the bill (H. R. 2688) is to pay to Honolulu Plantation Co., a California corporation, the sum of \$3,250,000 as compensation for the damages to and the loss of property sustained by said company to its mill, water system, and other property of its enterprise by reason of the expropriation by the United States of America of divers lands held under lease owned and operated by this company as a part of its enterprise.

The Navy Department is advised by the Department of Justice that most of the condemnation proceedings covering the Government's acquisition of leasehold rights of the Honolulu Plantation Co. have been concluded by stipulation or voluntary settlement with the company, which has accepted the compensation paid as full and complete satisfaction of all claims against the United States. However, the following observations are submitted with respect to any cases which may not have been so concluded.

According to the company's petition to Congress filed in support of the subject bill, the fee acquisitions of the Federal Government in this matter represent 2,428.44 acres, of which 1,734.11 acres are reported as acquisitions for naval uses. For the purpose of this report, the figures of the company are accepted as substantially accurate, although permission is requested to file such corrected data as a further study may disclose.

The statement of the president of the company, which appears in the company's petition to Congress, asserts that the amount sought to be appro-

priated is not for the payment or recompense of any business loss or loss of profits but "the entire amount for which redress is sought is to reimburse the stockholders for that part of their capital which has disappeared or has been destroyed as a result of the governmental action." In other words, the company's claim is one for the reduction (resulting from the Government's taking) in capital value of that part of its enterprise which remains after the Government's taking.

Although the company's petition does not include copies of the leases under which it occupied the various lands that were taken by the Government, it appears that there are five major leases involved, four of which have more than 20 years to run and the fifth does not expire until December 31, 1953.

Concerning the use of the property under these leases, the company's president in his statement said: "The company's stockholders and its directors have assumed that the company would always be able to lease these lands for cane cultivation for so long as the company desired to remain in business. This was so because the use to which they were being put by the Honolulu Plantation Co. was their best and most profitable use, and, therefore, it was to the mutual advantage of owners and plantation to come into harmony. Under these circumstances, these lands were considered as valuable to Honolulu Plantation Co. and were, in fact, as useful, as though each parcel had been owned in fee simple instead of leased. Certainly, having

the full use of them for long periods for production, the company derived all of the benefits of having title to them without the additional investment of capital in them."

Apparently the company has come to Congress for relief in the matter because it has been advised by its counsel that as lessee it has no recourse at law. In this connection, the company's petition to Congress points out that—

"The Government's legal position as stated by the Attorney General in a few court appearances and repeated by various branches of the Government is that upon the basis of decided cases, the Government is foreclosed from making any compensation for the loss of the beneficial use of these croplands to the plantation, because of the separation of ownership between fee and beneficial use and because of the fact that the plant site itself was not physically appropriated, wherefore it contends that there can be no 'severance damage' paid for the plant site."

The case of *Baetjer v. The United States* (143 F. (2d) 391) involved practically the same circumstances as are presented here, except that in the *Baetjer* case, the lands acquired by the Government were owned in fee, whereas in the present case they were occupied under long-term leases. *Baetjer* was trustee for Eastern Sugar Associates which owned approximately 30,000 acres of cane lands, roughly two-thirds of which, together with the company's mills, were located on the island of Puerto Rico. The remaining 10,000 acres, more or

less, were situated on Vieques Island, 10 to 17 miles distant. Most of these lands on Vieques Island were condemned by the United States for naval uses. The district court discarded evidence introduced for the purpose of showing that the capital value of the company's holdings on the island of Puerto Rico had depreciated as a result of the takings of its lands on Vieques. The circuit court of appeals (first circuit) held that the evidence was admissible for the purpose of showing that the overcapacity of the mills with respect to cane lands available to supply them had depreciated in value. "In short," the court said, "the stricken evidence would indicate a compensable loss only if it means that after the taking the appellants' mills had an uneconomic overcapacity so that they could not be operated by anyone as efficiently and therefore as profitably as before the taking, this being a matter which a hypothetical willing buyer would consider in determining what he would pay for the property."

The Navy Department is not informed of any "decided case" that has ever held that a different principle than that followed in the Baetjer case should be applied in a situation where the lands taken were occupied under long-term leases under circumstances such as we have here, nor does it understand that the Attorney General of the United States has ever had occasion to sanction such a distinction.

Whatever differences of viewpoint there may be on the subject, the Navy Department suggests that the legal phases of the matter be fully explored by

counsel for the Claims Committee before final action is taken on the bill. If the committee's counsel should, following a careful investigation of the matter, determine that the Company has a remedy at law, the Navy Department believes that the company should be required to pursue the remedy in the courts. If, on the other hand, no legal remedy is found to exist and it should appear that the claim is one based on equity alone, the bill would be objectionable in that its enactment would involve a precedent opening up the floodgates by encouraging the filing of many claims for consequential damages of a nature which the highest courts have repeatedly held are not compensable on the basis of law.

For the foregoing reasons the Navy Department strongly recommends against the enactment of the bill H. R. 2688.

The Navy Department has been informally advised by the Bureau of the Budget that there would be no objection to the submission of this report.

Sincerely yours,

JAMES FORRESTAL.

War Department

Washington, July 19, 1945.

Hon. Dan R. McGehee,
Chairman, Committee on Claims.
House of Representatives.

Dear Mr. McGehee: The War Department is opposed to the enactment of H. R. 2688, a bill to provide compensation to Honolulu Plantation Co.,

a California corporation, as compensation for damages sustained, with regard to which you have requested the views of this Department.

Under the proposed legislation the Secretary of the Treasury is authorized and directed to pay to the Honolulu Plantation Co., a California corporation, the sum of \$3,250,000 as compensation for the damages to and the loss of property sustained by the said company to its sugar mill, water system, and other properties of its enterprises by reason of the expropriation by the United States of America of divers lands held under leases owned and operated by the company as an integral part of its enterprise.

The company represents in its petition to the Congress for relief that during the years from 1935 to June 1944, inclusive, the War and Navy Departments condemned in fee simple a total of 2,325.53 acres of land bordering on the perimeter of Pearl Harbor, T. H., which the company held under lease from various lessors for the growing of sugar cane for use in the operation of its sugar-refining mill. Of the 2,325.53 acres, 753.55 acres allegedly were condemned at the request of the War Department and 1,571.98 acres at the request of the Navy Department. The company's petition further shows that initially it had a total of 7,400 acres under its control, including lands purchased by the company in fee simple. On this land, but principally on the land owned in fee simple, which the United States district engineer, Honolulu, T. H., estimates as 313 acres, the company had erected

extensive improvements consisting of a sugar-refining mill, warehouses, service shops, dwellings, fences, wells, pumping stations, booster stations, irrigation ditches, pipe lines, canals, a narrow gage railway, and other facilities required in its cane-growing and sugar-refining operations.

In 1936 the company extended the term of four of its five major leases to December 1, 1965, and in 1940 extended the term of the fifth lease to December 31, 1953. The company estimates its capital investment in excess of \$4,000,000. It alleges that the lands appropriated by the Government were the most productive and the most economically operated cane areas held by the plantation and that, as a result thereof, it has suffered a loss of capital amounting to not less than \$3,000,000.

In its petition to the Congress the company, in effect, is claiming severance damages due to (1) an immediate shrinkage in the value of the assets and (2) the impairment of the ability to earn a fair return upon the value of the residual investment. It states that both elements resulted from the takings of lands having a raw sugar availability of approximately 30,000 tons per annum and leaving property with a sugar availability of approximately 15,000 tons per annum.

The company seeks relief from the Congress principally on the alleged ground that it is "the firm and consistent policy of the Federal departments concerned to confine payments and offers of payment to the taking of such tangible property as was severed from the integrated enterprise, valued

on such separated basis and with respect solely to the tangible property owned in full and complete title by the petitioner;" that the company has no remedy at law; that the Departments concerned would subject to petitioner to long years of expensive litigation by their opposition to the establishment of a legal exception to the above rule under the special facts of the petitioner's case; and that consequently the Congress is the only forum now open to the petitioner for the recovery of the just compensation guaranteed by the fifth amendment to the Constitution.

The contentions of the petitioner set forth above do not appear to be well founded insofar as the War Department is concerned. Of the 753.55 acres of company-leased land allegedly taken by the War Department, the records of this Department show that only 623.37 acres were taken for the War Department and that 614 acres thereof were taken by condemnation proceedings instituted in the United States District Court for the Territory of Hawaii, Civil No. 289, in June 1932 and concluded by judgment of the court on February 25, 1935. This judgment awarded \$117,686 to the Honolulu Plantation Co. "in full for its interests in the land and improvements to be condemned (except such amount as it may be entitled to receive from the compensation awarded or to be awarded the owners of the fee pursuant to separate stipulations entered into with them) for damages to growing crops, and for damage due to the severance of the leasehold interests owned by it and to be con-

demmed from the remaining leasehold interests which it owns and for its interest in the improvements on the land to be condemned which is owned by the trustees of the S. M. Damon estate." The judgment further provided that the said company had the right to harvest all crops then being grown by it upon certain fields subject, however, to exceptions as to particular fields which were either to be handed over to the War Department by certain definite dates or within specified times after written notice by the commanding general of the Hawaiian Department. This judgment was rendered the year prior to the year in which the company states that four of its five major leases were extended for an additional term of 30 years.

It is the considered view of this Department that the court gave full consideration to the total damages to the company arising out of the taking of the 614 acres by the War Department and that the judgment of the court included complete reimbursement for all damages sustained by the company as a result of the taking. The 70.96 acres allegedly condemned by the War Department in 1940 were actually taken by the Federal Works Agency and hence any damages resulting from this taking, although the land was used for military housing purposes, is not believed to be the responsibility of the War Department.

The War Department does not believe that further relief to the company through the enactment of a private relief bill such as H. R. 2688 is advisable. Relief to the company, if any, was available

through an appeal from the decision of the local Federal court. The records of this Department do not disclose that an appeal was prosecuted. The question of the value of the property taken and any severance damages to the remainder of the company's holdings is considered to have been adjudicated. Under the circumstances, the War Department is opposed to the enactment of H. R. 2688.

This bill would result in the payment of \$3,250,000 to the petitioner and would undoubtedly bring forth a flood of similar bills for relief of parties who are dissatisfied with settlements made by the Government or the courts.

The Bureau of the Budget advises that there is no objection to the submission of this report.

Sincerely yours,

ROBERT P. PATTERSON,

Acting Secretary of War.

UNITED STATES EXHIBIT "A"

(Admitted in Evidence 1-14-47)

C. Brewer and Company
Limited

November 29, 1940.

This Letter No. 10003-CHM
Received Nov. 30/40.

(Copy)

Trustees Under the Will of
Samuel Mills Damon, Deceased
c/o Bishop Trust Company, Ltd.
Honolulu, T. H.

Dear Sirs:

Proposed New Lease of Moanalua Lands to
Honolulu Plantation Company

In further reply to your favor of October 18, 1940, we now indicate that a tentative form of lease has been drawn up by us and same is submitted to you, herewith.

No effort has been made to describe the areas to be leased as these will have to be prepared by some surveyor who has complete data, but said description should, of course, include the fields mentioned in your favor and certain adjacent land that is now held under the existing lease, except the areas recently condemned.

It may be well to fix the aggregate minimum rental figure with definiteness when the form of lease is finally accepted.

We will be glad to prepare the form of new lease in a permanent way if you will furnish us with a description of the land to be demised and will also indicate your approval of the form of said new lease as submitted, or state what changes you desire to have made therein.

The condemnation of two areas recently effected would seem to us to call for a refundment of the rent paid for the last quarter of this year, proportionate to the area that has been lost.

Likewise, Honolulu Plantation Company has paid the taxes on the condemned land for the full year of 1940, and here again, equity would seem to call for a refundment of 1/4th of the 1940 taxes, proportioned on the area lost by virtue of said condemnations. May we request your favorable consideration of these two items?

Very truly yours,

C. BREWER AND COMPANY,
LIMITED.

CHAS. H. MERRIAM,
Manager, Land Department.

CHM:LHM Encl.

UNITED STATES EXHIBIT "B"

(Admitted in Evidence 1-14-47)

This Indenture of Lease, made this day of 1940, by and between J. Waterhouse, E. H. Wodehouse, W. F. Frear and J. E. Russell, all of Honolulu, City and County of Honolulu,

Territory of Hawaii, Trustees under the Will and of the Estate of Samuel M. Damon, deceased, hereinafter called the "Lessors", of the first part, and Honolulu Plantation Company, a California corporation, hereinafter called the "Lessee", of the second part,

Witnesseth:

That the Lessors, in consideration of the rent hereinafter reserved and of the covenants herein contained and on the part of the Lessee to be observed and performed, do hereby demise and lease unto the Lessee:

All those certain tracts or parcels of land situate within the Ahupuaa of Moanalua, City and County of Honolulu, Territory of Hawaii, being portions of Apana 2 of the land mentioned or described in R. P. 7858 L.C.A. 7715 to L. Kamehameha, particularly described as follows:

(Description of land)

The total area hereby demised is acres, of which area acres are or are deemed to be cane lands.

Together with such rights of way, of the nature of easements, for a railway or railways, field roads, flumes, ditches, tunnels, syphons and pipe lines over the adjoining lands of the Lessors as at present existing and used by the Lessee or such extensions thereof only as it may hereafter be found necessary to construct or instal for use in connection with the cultivation and agricultural use of the parcels of land hereby demised, provided always that such hereinabove mentioned existing rights-of-way are

used and such extensions thereof are constructed or installed and used so that they will not interfere with any use by the Lessors and their tenants of the adjoining lands of the Lessors and so that all the said above mentioned rights-of-way can be crossed on the level with vehicles at points suitable to the Lessors and that the Lessors and their tenants or tenants of land adjoining the parcels of land hereby demised are held harmless and free and clear of all liability against any claim for damages sustained by the Lessee or its employees, servants or agents by reason of the Lessors or any of them, or any of their said tenants crossing the said hereinabove mentioned rights-of-way by vehicles of any description.

To have and to hold the same unto the Lessee from and including the first day of January, 1944, for the term of Ten (10) years thence next ensuing, or a lesser term if the Trust hereinabove mentioned is determined prior to the end of the said ten year period, and at the expiration of this lease the Lessee shall according to the practice of cane cultivation followed in the Island of Oahu, be permitted to continue, but only in regular course of husbandry, the cultivation and harvesting of the then matured or maturing crop of cane on the demised premises until same is fully mature and harvested and shall pay rent for the area of the land so occupied by the Lessee or in use or under its control and until possession thereof is actually surrendered to the Lessors at the rate of 15.00 per acre per annum;

Yielding and paying therefor yearly and every year during said term unto the Lessors rent as follows:

Minimum Rental: The minimum rent shall be payable in four (4) equal installments, each in advance, on the 1st days of January, April, July and October in each and every year during the continuance of this lease, without any deduction, the first of such payments to be made on the 1st day of January, 1944, and the minimum rent for each calendar year for the land under lease shall be at the rate of Fifteen Dollars (\$15.00) per acre for the area of land cultivated in cane. Said rental to increase at the rate of twenty cents (20c) per acre per annum for any increase of One Dollar (\$1.00) in the average price of 96° New York raw sugar above Fifty Dollars (\$50.00) per ton and proportionately for any fraction of an increase of One Dollar (\$1.00), said increase, however, to cease when the price of 96° raw sugar exceeds \$100.00 per ton. In case the present Sugar Act continues in its present or a similar form, 75% of any Federal compliance payment for the production or marketing of sugar shall be ascertained and there shall also be determined the total tons of sugar harvested or marketed by the Lessee during the particular year in which the compliance payment is received and then there shall be determined the actual increase in the price per ton of sugar due to said payments which fractional increase per ton shall be added to the average market price per ton of 96° New York raw sugar and this

determination shall fix the rental value basis as hereinabove provided.

Payment of any increase in rental above the minimum basis shall be made within a reasonable time,—not more than 30 days,—after the close of the calendar year when the average price of sugar for such year can be determined together with the amount of any compliance payment received during the same year.

Lessors reserve, however, the right to withdraw from this Lease any or all areas not in sugar cane cultivation or not used for ditches or railroads upon giving to said Lessee sixty (60) days written notice of said intended withdrawal. Any such withdrawal will not entitle the Lessee to any abatement of rent.

Lessors also reserve from this lease an easement right-of-way, in common with the Lessee, over all roads leading mauka from Kamehameha Highway to other lands of said Lessors lying mauka of Fields 82 to 89, inclusive, for the purpose of ingress and egress to said lands. Said Lessors also reserve the right and privilege of installing water pipes along said roads to the mauka lands above referred to, it being agreed, however, that the work of installing said water pipes will only be performed at a time immediately subsequent to the harvesting of cane from said Fields 82 and 89, inclusive.

And the Lessors hereby covenant with the Lessee that upon payment by the Lessee of the rent as aforesaid and upon observance and performance of the covenants by the Lessee hereinafter contained,

the Lessee shall peaceably hold and enjoy the said demised premises for the term hereby demised without hindrance or interruption by the Lessors or any other person or persons lawfully or equitably claiming by, through or under them;

And the Lessee hereby covenants with the Lessors as follows:

That it (the Lessee) will pay the said rent in United States legal currency at the office of the Lessors or their agent in Honolulu in manner aforesaid, without any deduction, and without any notice or demand;

That it will also pay all taxes, rates, assessments, impositions, duties and other outgoings of every description to which the said premises or the Lessors or Lessee in respect thereof are now or may hereafter during the said term become liable, and thereafter so long as any of the said premises shall continue in the occupation of the Lessee in proportion to such occupancy and become liable, and whether the same taxes, rates, assessments, impositions, duties, charges and other outgoings are or shall be assessed to or be payable by law by either the Lessors or Lessee, including all assessments or charges for any permanent benefit or improvement of the premises hereby demised, or any part thereof, made under any betterment law or otherwise or any assessments or charges for sewerage or street or sidewalk improvements or municipal or other charges which may be legally imposed upon the said premises, or to which the said premises, or any part thereof or the Lessors or Lessee in

respect thereof are now or may during the said term become liable; provided, however, that the Lessors shall take no action of any nature which might create a liability upon the Lessee in the form of a permanent benefit or improvement without the consent of the Lessee; and provided, further, that if real property tax valuations are placed upon the property, or any part thereof which will require annual tax payments by the Lessee equal to, or in excess of the within rental rates per acre, then the Lessee may at its option withdraw from that portion of the property so taxed upon giving written notice to the Lessor of its intention so to do at least six months prior to such withdrawal;

That it will out of its own moneys during the whole of the said term, make, build, maintain and repair all fences, drains and roads required by law to be made, built, maintained and repaired upon or in connection with or for the use of the said premises or any part thereof;

That it will also out of its own moneys forthwith construct and erect and thereafter during the remainder of the said term, maintain and keep in good repair, a good and substantial fence around the several parcels of land hereby demised and will not impound or cause to be impounded any cattle or horses of the Lessors or of their tenants of adjoining lands that may be found on the said lands hereby demised nor hold the Lessors liable for any damage that may be done by the cattle or horses of said Lessors or their tenants of adjoining lands to the lands hereby demised or to anything thereon:

That it will not make or suffer any strip or waste or unlawful, improper or offensive use of said premises or of any improvements thereon, nor, without the consent of the Lessors in writing mortgage or assign this lease nor sublet nor part with the possession of the whole or any part of the said premises;

That it will use the land hereby demised for cultivation only or in furtherance of the cultivation of such parcels thereof as shall be suitable for cultivation and, except as herein demised, shall not exercise any rights over any other parts of the Ahupuaa of Moanalua except rights of way over public roads whether such rights are or are not appurtenant to the lands hereby demised;

That it will not sink any additional wells on any land within the boundaries of the Ahupuaa of Moanalua nor use any water raised on or taken or derived from any such land other than it is now entitled to use without the consent in writing of the Lessors first had and obtained.

That it will from time to time and at all times during the said term well and substantially repair, maintain, amend and keep all buildings and improvements now or hereafter to be built on the parcels of land hereby demised with all necessary reparations and amendments whatsoever;

That it will permit the Lessors or their agents at all times during the term hereby demised to enter the said premises and examine the condition thereof, and survey the same;

That at the end of the said term or other sooner

determination of this lease, it will peaceably deliver up to the Lessors possession of the said demised premises, together with all erections and improvements upon or belonging to the same by whomsoever made, except buildings and machinery, in good repair, order and condition;

Provided, however, that this demise is upon this condition, that if the Lessee shall fail to pay the said rent or any part thereof within thirty (30) days after the same becomes due, whether the same shall or shall not have been demanded, or shall become bankrupt or go into liquidation, or shall fail faithfully to observe or perform any of the covenants or conditions herein contained and on its part to be observed or performed or shall abandon the said premises, the Lessors may at once re-enter the said demised premises or any part thereof in the name of the whole and at their option terminate this lease without service of notice or legal process and without prejudice to any other remedy or right of action for arrears of rent or for any preceding or other breach of contract;

And it is hereby expressly agreed and declared that the acceptance of rent by the Lessors shall not be deemed to be a waiver by **them of any breach** by the Lessee of any covenant herein contained, and that the term "Lessors", in these presents shall include the Lessors, their successors in trust and assigns, and also that the term "Lessee", shall include the Lessee, its successors and permitted assigns;

In witness whereof, the said Lessors as such

Trustees have executed this instrument in quadruplicate on the day of, 1940, and the said Lessee has likewise caused this instrument to be executed in quadruplicate on the day of, 1940.

.....
.....
.....

Trustees under the Will and of the Estate of Samuel M. Damon, Deceased.

HONOLULU PLANTATION
COMPANY,

By
Its Attorney-in-fact.

UNITED STATES EXHIBIT "C"

(Admitted in Evidence 1-14-47)

C. Brewer & Company, Ltd.

Honolulu, Hawaii

May 5, 1941

This Letter No. 578-HTK

Mr. J. Waterhouse,

Mr. E. H. Wodehouse,

Mr. W. Frear,

Mr. J. E. Russell,

Trustees under the Will of Samuel Mills
Damon, Deceased, Honolulu, Hawaii.

Gentlemen:

Under date of October 18, 1940, the Trustees of the S. M. Damon Estate offered a lease to Honolulu Plantation Company under certain terms as therein set forth, which offer, together with the terms thereof, was accepted on behalf of Honolulu Plantation Company under date of October 21, 1940. It was understood that a formal lease would be thereafter executed.

This is to advise you that in reliance upon such offer and acceptance of said new lease, Honolulu Plantation Company has replanted the cane land in Field 84 and has cleared an additional ten acres of this field not heretofore in cane and is proceeding to plant such new cane land. The company has also completed plans for the further clearing of Field 87 and the planting of the enlarged area in cane. This program, together with programs

in connection with the land subject to the new lease, has been instituted in anticipation that the formal new lease will be executed in due time, and will be forthcoming at your convenience.

Yours very truly,

C. BREWER & COMPANY,
LIMITED,
as agents for Honolulu Plantation Company,
/s/ H. T. KAY,
Vice-President.

HTK:FBS

Rec. at Alexander & Baldwin, May 6/41. Read
by W.F.F.

(Copy).

UNITED STATES EXHIBIT "D"

(Admitted in Evidence 1-14-47)

Bishop Trust Company, Limited
Honolulu, Hawaii

May 12, 1941.

Attn. Mr. H. T. Kay, Vice President

C. Brewer & Co. Ltd.,
as Agents for Honolulu Plantation Company,
Honolulu, Hawaii.

Gentlemen:

Re Estate of S. M. Damon.

This will acknowledge receipt of your letter of the 5th instant, addressed to the four Trustees under the Will of Samuel M. Damon, Deceased. Two of these Trustees are at present away from the Territory, but as soon as we can get a majority we will take up the matters mentioned in your letter.

Very truly yours,

/s/ J. WATERHOUSE,
a Trustee.

bc.h

Mr. Waterhouse:

We will bring Mr. Kay's letter to your attention again when Mr. Wodehouse or Mr. Russell returns to Honolulu.

BISHOP TRUST CO., LTD.
B. C.,
Asst. Treasurer.

May 12/1941.

UNITED STATES EXHIBIT "E"

(Admitted in Evidence 1-14-47)

(Copy)

Bishop Trust Company, Limited
Honolulu, Hawaii

August 15, 1941.

C. Brewer & Company, Ltd.,
Agent, Honolulu Plantation Company,
Honolulu, T. H.

Attention: Mr. P. E. Spalding, President

Dear Sirs:

Due to our inability now to lease to the Honolulu Plantation Company certain areas at Moanalua, and your inability to deliver certain areas as a result of the recent federal condemnation proceedings, the Trustees under the Will of Samuel M. Damon now propose to lease for a period of ten years from the expiration of the present lease, or until December 31, 1953, unless there is an earlier determination of the Trust, the following areas, subject to the following terms, conditions and rights of withdrawal:

The land to be leased to comprise fields 82-89 inclusive, except a strip approximately 250 feet deep just mauka of Kamehameha Highway along the entire makai end of field 83, which shall be surrendered at once from the present lease, the plantation railroad to be moved mauka of this strip; excepting also a portion of fields 88 and 89 to a

point opposite "E" Road; the lessors to have the right to withdraw, upon eighteen months' written notice, the remaining area of field 83 prior to December 31, 1945; fields 86, 88 and the remaining portion of 89 up to a point opposite John Rodgers Airport Road, prior to December 31, 1948; and all of field 84 mauka of the ditch, prior to December 31, 1950.

It will be noted that no land makai of Kamehameha Highway is to be included in the proposed new lease.

The minimum rental to be 15 per acre for lands occupied for plantation purposes. Said rental to increase at the rate of 20c per acre per annum for any increase of \$1.00 in the average price of 96° New York raws above \$50, and proportionately for any fraction of an increase of \$1.00, said increase, however, to cease when the price of 96° raws exceeds \$100.

The Plantation to pay the property taxes.

If the present Sugar Act is to continue in its present or a similar form, 75% of the federal payments to be added to the New York basis price to determine the average price of 96° raw sugars which fixes the rental value basis.

All areas not in sugar cane and not used for ditches or railroads may be withdrawn by the Estate's giving sixty days' notice, without penalty to the Estate, including any reduction in rent.

The Damon Estate to have an easement over the roads so as to give proper ingress and egress to the lands mauka of fields 82 and 89, also to have

the privilege of laying water pipes along such roads at such times as the fields have just been harvested in order not interfere with plantation operations.

The lease to include a condemnation clause, hunting and trespassing clause, and strip and waste clause, in form satisfactory to us, together with such other provisions as shall be deemed proper.

We do not concur in some of the provisions which were contained in your former tentative draft, namely, the provision that in case the lessee continues to occupy after the termination of the lease in order to harvest crops the rent be at the fixed rate of \$15 per acre, instead of at the rate hereinabove mention; and the clause on page 5 giving the lessee the option to withdraw certain areas. We think that the covenant on page 6 with reference to cultivation and rights of way would be unnecessary. The surrender clause at the bottom of page 6 should provide that in case buildings shall be removed the lessee shall restore the surface of the land to its original condition.

If these terms are agreeable, please signify acceptance in writing at your earliest convenience, and we will submit a formal draft of lease for your acceptance.

Your very truly,

/s/ JOHN WATERHOUSE,

/s/ E. H. WODEHOUSE,

/s/ JOHN E. RUSSELL,

Trustees, Estate of S. M. Damon.

UNITED STATES EXHIBIT "F"

(Admitted in Evidence 1-14-47)

C. Brewer and Company
Limited

December 16, 1941

This Letter No. 1667-HTK

Dec. 18, 1941

(Copy)

S. M. Damon Estate
c/o Bishop Trust Company
Honolulu, T. H.

Gentlemen:

Honolulu Plantation Company has been requested by the Military Governor of the Territory of Hawaii, under the authority vested in him, to cooperate in the matter of immediately planting and growing food crops toward the end that the Island of Oahu may become self sustaining during the war. This cooperation has been agreed to by the plantation, but in order to make the same effective, it will be necessary that the plantation's lessors give their consent to the use of any lands leased by them to the plantation for such purposes, releasing the lessee from obligations to pay rent, taxes, and such other lessee obligations which might be affected through such use.

As presently contemplated, several thousand acres now under lease by Honolulu Plantation Company will be used for the growing of food crops, and undoubtedly many of the acres that will be used are those presently devoted to the growing of sugar cane. Fixed and percentage rental provi-

sions, including that relating to gross proceeds should be accordingly suspended until such time in the future as may be agreed upon by the lessor and lessee for the renewal of normal operations. Accordingly, the suspension of lessee obligations requested should be broad enough to cover all or any part of the lands demised. To what extent your lands will be so used cannot be estimated by us at this time, but please be assured that insofar as it may be practicable and within the discretion of your lessee, lands of the respective lessors will be as equitably apportioned as possible to the end that no one lessor will have to bear an unequal share of the burdens imposed.

This request is presently confined to those lands to be diverted to the purposes stated as it is hoped that the plantation will be able to carry on cane growing operations with respect to the remaining lands under such normal schedules as may be possible.

Your immediate cooperation in this respect will be greatly appreciated as every effort is being made to comply with the Military Governor's request as soon as possible.

Yours very truly,

HONOLULU PLANTATION
COMPANY,

By C. BREWER AND COMPANY,
LIMITED,

Its Agent,

By H. T. KAY,
Vice President.

UNITED STATES EXHIBIT "G"

(Admitted in Evidence 1-14-47)

C. Brewer and Company

November 11, 1943.

This Letter No. 9472-CHM
Refers Your No. N1-13/ Marine
Camp — N1-13/Marine
Storage 30276

The Public Works Officer
Commandant, Navy Number 128
(one two eight)
c/o Fleet Post Office

San Francisco, California.

Right of Entry on Two Tracts—74 Acres and
135 Acres—at Moanalua, Ewa, Oahu, Issued
by Honolulu Plantation Company

Attention: Capt. G. D. Wetsel (CEC) U.S.N.
District Public Works Officer

Gentlemen:

This acknowledges receipt of your favor of November 9, 1943, with specified enclosures which we find to be in satisfactory form and for which we thank you.

In connection with the preparation of document for the leasing of these areas, we would indicate that as Honolulu Plantation Company's tenancy

expires on these areas on December 31, 1943, it would be best for you to deal with the Trustees of the S. M. Damon Estate in negotiating the proposed lease.

Very truly yours,

C. BREWER AND COMPANY,
LIMITED,

/s/ CHAS. H. MERRIAM,
Manager, Land Department.

CHM:LHM

UNITED STATES EXHIBIT "H"

(Admitted in Evidence 1-14-47)

C. Brewer and Company, Limited

September 16, 1943.

This Letter No. 9416-CHM

Refers Your No. 24640

Commandant

Fourteenth Naval District

Navy Number 128 (One Two Eight)

c/o Fleet Post Office

San Francisco, California.

Attention: Capt. G. D. Wetsel (CEC) U.S.N.

Request for issuance of Right of Entry by
Honolulu Plantation Company on 119 acres
more or less of Moanalua lands, fields 82
and 83, for use of Navy Department.

Gentlemen:

This acknowledges receipt of your favor of September 11, 1943, with specified enclosure requesting that the above mentioned land be made available by way of right of entry and finally by a lease for the use of the Navy Department on an important Navy installation.

On behalf of Honolulu Plantation Company, your request for right of entry is hereby granted, subject, however, to the reservation by said Company of all damages that may be sustained by said Company through loss of cane crops, through increased costs caused adjacent areas by virtue of

this installation and any other damages that may be sustained.

It is our suggestion that you also gain approval of this right of entry by the land owners — the Trustees of the S. M. Damon Estate.

In the matter of the issuance of a lease of this land for your use, it is our suggestion that you deal directly with the Trustees of the S. M. Damon Estate for such tenancy as may be required by you.

Very truly yours,

C. BREWER & CO., LTD.,

/s/ CHAS. H. MERRIAM,

Manager, Land Department.

CHM:LHM

UNITED STATES EXHIBIT "I"

(Admitted in Evidence 1-14-47)

C. Brewer and Company, Limited

January 3, 1943

This Letter No. 5701-HTK

Vice-Admiral Robert Lee Ghormley, U.S.N.,
Commandant, Fourteenth Naval District
Pearl Harbor, Oahu, T. H.

Dear Admiral Ghormley:

In furtherance of our conversation recently, I desire to present this letter advising you formally of the grave situation that Honolulu Plantation Company finds itself in as a result of the continuous takings by the United States Government of its lands and crops and properties operated in conjunction therewith.

Prior to 1930 and before the institution of initial proceedings for the acquisition of the Company's lands for Army and Navy projects, the Company had been developed into a plantation capable of producing approximately 35,000 tons of raw sugar per annum, and making its refinery, which had a refined sugar capacity of approximately 45,000 to 50,000 tons, independent of other sugar producers. After the recent takings, the Company today is only capable of producing approximately 15,000 to 20,000 tons of raw sugar and consequently has become dependent upon other raw sugar producers for sufficient raw sugar to maintain operation of its 45,000 ton refinery. Although it is now possible

to secure such additional raw sugars necessary to continue operation of the refinery from other producers because of the existing war emergency, the post-war outlook for such outside supplies is wholly indefinite and subject to withdrawal because of contracts with Mainland refineries. The shrinkage in sugar production from approximately 35,000 tons to less than 20,000 tons has been due principally to condemnations by the United States Army and Navy. It is understood that additional takings are contemplated and that it is possible that the greater part, if not all of the area now occupied by the plantation in its production of raw sugar will be taken by the Government before the war has ended. The Company has been informed from time to time by officials of the Government that although the 5th Amendment of the Constitution guarantees every person that he shall not be deprived of his property without due process of law and that it shall not be taken for public use without just compensation, nevertheless, there does not exist under existing statutes and appropriations authority and funds for the payment of compensation reimbursing the Company for the damages suffered by it as an enterprise and business. Consequently, under the existing Federal government method of appraisal and procedure for payment of damages suffered the Company has not received any compensation for the very substantial damage to its enterprise and business.

It is obvious that if these takings continue the Company will shrink to a point where it can no

longer stay in business, leaving it with a huge plant of equipment with very doubtful salvage value to show for the formerly prosperous enterprise capable of earning substantial annual profits. Every effort to keep the plantation going through the conversion of upper hillside lands to the production of sugar cane has been undertaken. The greater part of the monies received by the Company from the condemnation proceedings up to this time have been used to prepare new lands and build the necessary installations, roads, pumps, ditches, reservoirs, pipelines, etc. necessary to operate them. Although new varieties of cane having much greater productivity than those formerly used by the plantation have been of great help in absorbing some of the crop shrinkage, nevertheless it has been impossible to make up the major loss flowing from the taking of the more productive lower lands. This loss in sugar yields is presently averaging around two to three tons of sugar per acre per crop. At the present time the Company knows of no new lands available to replace recent takings or any contemplated new takings. I shall not burden you with details as to how each taking increases the cost of operating that part of the enterprise remaining. Obviously the overhead costs of an enterprise geared to a 35,000 production increases per unit ton of sugar progressively as the production decreases, even though some savings are accomplished in the matter of reductions in personnel, etc. Ultimately a point is reached where the overhead costs, particularly ir fixed

charges, are too heavy for the production obtainable. That is the point we fear has been reached in the case of this Company. The impending death faced by the enterprise is illustrated by the attached statement showing the shrinkage and dislocations caused by these takings and how drastic the effect has been upon the Company's sugar production. You will note that in the data there is reflected a constant endeavor to keep the enterprise going by replacing lands taken by new lands but as graphically illustrated by the figures there were not sufficient new lands available or procurable to replace the large areas taken and as the enterprise was forced to go to higher elevations for its replacements, there was among other dislocations, that of water distribution requiring pumping to much higher elevations at greatly increased costs.

As we appraise the situation there are two ways in which the Company can receive the just compensation guaranteed by the Constitution:

1. For the Navy at this time to purchase Honolulu Plantation Company in its entirety at a price fairly reflecting the earning capacity of the enterprise, assuming there had been no takings.

2. For the Company to appeal to Congress for relief with respect to losses heretofore suffered to its enterprise and for the establishment of machinery by way of appropriate legislation, to compensate for future losses.

In case the second method is pursued it is of pertinent importance that the Company state in its application for relief, the nature and extent of

past takings and of future takings now contemplated by the Navy. The furnishing of any such information will, of course, be considered confidential and will only be used for the purpose stated.

During the many years the Company has been suffering these losses, there has been no failure on its part to cooperate with the government and the armed services whenever the question of national defense arose and it was stated by the armed services that the Company's properties were needed as a part of the defense and war programs. The compensation received so far has only been for crops destroyed. The matter which we have put before you here, however, is one of graver import to the Company. This enterprise has a capital investment of \$5,000,000. Approximately 40% of the earning capacity of this investment has been destroyed through the loss of productive lands to the benefit of the country as a whole. It does not seem equitable that this burden should be placed on the Honolulu Plantation Company alone. Whether intentional or not, the piece-meal methods pursued in the taking of these lands have resulted in the Company being rendered legally defenceless to recover all the damages suffered by it. We sincerely hope that a different course may be adopted in the future and accordingly request that you give immediate and serious attention to the Navy buying the entire enterprise now. If you are unprepared to so recommend at this time, can you advise the Company now of all the possible takings of the Company's properties which are

under consideration or contemplated for the future in order that the Company may institute proper proceedings in application for relief from Congress.

Attached hereto are some statistics showing the reduction of the Company's properties, the efforts to overcome these losses and the increased cost of irrigation operations annually as estimated by the plantation. It seems to us that just compensation should take these factors into consideration now.

Yours very truly,

HONOLULU PLANTATION
COMPANY,

By /s/ P. E. SPALDING,
Its Attorney-in-Fact.

HTK:mfl encls.

HONOLULU PLANTATION COMPANY

Summary of Crops 1928—Nov. 1, 1943

96° Sugar Basis

Year	Plantation Area Under Cultiva- tion Jan. 1	Crop Area in Acres	Total	Tons 96° Sugar per Acre	Tons 96° Sugar per Acre Month	Age
	Tons 96° Sugar					
1928	5615.00	3829.25	37,078.89	9.68	.477	20.3
1929	5568.00	3677.75	34,146.90	9.28	.483	19.3
1930	5541.50	3593.00	33,678.91	9.37	.503	18.6
1931	5493.75	3646.75	31,770.04	8.71	.480	18.1
1932	5540.50	3582.75	33,219.49	9.27	.498	18.7
1933	5549.25	3930.25	32,109.10	8.17	.468	17.5
1934	5524.75	3334.25	24,790.16	7.44	.433	17.2
1935	5398.75	3066.25	28,203.05	9.20	.469	19.6
1936	4772.75	3097.25	29,207.04	9.43	.488	19.3
1937	4837.50	3415.00	29,575.17	8.66	.478	18.1
1938	5074.00	3401.85	27,402.68	8.06	.446	18.0
1939	5252.25	3704.00	28,075.64	7.58	.459	16.5
1940	5153.50	3398.75	26,447.70	7.78	.476	16.6
1941	4876.50	3310.75	25,922.41	7.83	.437	18.0
1942	4466.00	2427.59	17,324.43	7.14	.404	17.5
1943*	3978.00	2287.00	17,664.67	7.72	.377	20.5

* As of Nov. 1, 1943. Area under cultivation includes 107.25 acres of unirrigated area.

HONOLULU PLANTATION COMPANY

Summary Cane Area Lost from 1-1-34 to 11-1-43

To Whom	Acres	Year	Acres
U. S. Navy.....	1166.70	1934	134.25
U. S. Army	357.67	1935	565.75
Territory of Hawaii	145.33	1936	64.78
Damon Estate	134.78	1936-37	7.75
Honolulu Plantation Co.....	46.72	1937	20.05
Fallow	22.26	1938	9.50
Crop Failure	64.61	1939	19.38
McGrew Estate	27.84	1940	607.71
Miscellaneous	13.75	1941	146.86
		1941-43	67.29
Total.....	2479.66	1942	331.55
		1943	504.79
		Total.....	2479.66

HONOLULU PLANTATION COMPANY

Cane Area Lost from 1-1-34 to 11-1-43

Field	Acres Lost	Year	To Whom
1	.38	1942	Crop Failure
1	4.35	1942	T. of H.
1	10.66	1942	H. P. Co. Vegetables
1	48.61	1943	U. S. Navy
2	.19	1942	U. S. Army Rd.
2	1.07	1942	H. P. Co. Rd.
3	.19	1942	U. S. Army Rd.
3	8.07	1943	U. S. Navy
4	.25	1936	T. of H. Rd.
4	.60	1940	H. P. Co. Ditch
4	.50	1942	T. of H. Rd.
4	1.17	1943	T. of H. Rd.
4	8.50	1943	Crop Failure
5	.68	1936	T. of H. Rd.
5	.34	1942	T. of H. Rd.
7	10.61	1942	U. S. Army
8	.07	1938	H. P. Co. Rd.
8	.21	1942	H. P. Co. Loading Stat.
9	1.25	1942	U. S. Army
10	.50	1938	H. P. Co. Ditch
11	.58	1938	H. P. Co. Ditch
11	.25	1942	H. P. Co. Loading Stat.
13	.35	1937	H. P. Ditch
13	.90	1942	U. S. Army
13	----	----	-----
14	.39	1937	H. P. Co. Ditch
14	1.00	1942	U. S. Army
15	.05	1939	H. P. Siphon
16	.66	1938	H. P. Co. Ditch
17	.74	1938	H. P. Co. Ditch
18	.50	1938	H. P. Co. Ditch
19	26.22	1943	T. of H.
20	69.97	1943	T. of H.
21	1.40	1942	U. S. Army
22	.49	1937	H. P. Co. Ditch
23	1.07	1937	H. P. Co. Ditch
24	6.40	1937	H. P. Co. Ditch
24	.17	1939	H. P. Co. Pipe Line
24	1.24	1942	U. S. Army
24	1.52	1937	T. of H.

Field	Acres Lost	Year	To Whom
26	.25	1937	H. P. Co. Ditch
26	4.16	1941	U. S. Army
27	.36	1939	H. P. Co. Ditch
28	.30	1937	H. P. Co. Ditch
26	.55	1937	H. P. Co. Ditch
30	.18	1937	H. P. Co. Ditch
30	.75	1940	H. P. Co. Rd.
31	.25	1942	U. S. Army
33	1.25	1937	T. of H.
35	.26	1942	H. P. Co. Rd.
37	1.50	1942	U. S. Army
37	1.50	1943	Crop Failure
38	.81	1941	H. Dowsett
38	13.92	1941	U. S. Army
38	19.91	1942	Crop Failure
38	3.00	1943	Crop Failure
38	9.00	1943	Fallow
40A	2.22	1939	McCandless
41	1.50	1942	U. S. Army
43	.38	1940	H. P. Co. Rd.
45	1.04	1941	U. S. Army
45	1.00	1942	U. S. Army
46	2.00	1937	T. of H.
46	8.00	1940	Fallow
46	4.00	1940	Crop Failure
46	7.79	1941	McGrew
46	6.21	1942	Crop Failure
46	1.00	1942	U. S. Army
47	1.55	1936	United Dredge Co.
47	8.53	1940	McGrew
48	1.27	1936	T. of H.
48	.44	1938	H. P. Co. Hse.
48	.08	1939	H. P. Co. Hse.
48	.93	1940	H. P. Co. Garden (Veg.)
48	11.52	1940	McGrew
48	.17	1942	H. P. Co. Garden (Veg.)
48	11.70	1942	U. S. Army
49	.33	1940	H. P. Co. Loading Stat.
53	1.79	1937	H. P. Co. Camp Site
53	3.43	1938	H. P. Co. Camp Site
53	2.60	1941	U. S. Army
53	.64	1942	U. S. Army

Field	Acres Lost	Year	To Whom
53	.44	1943	Crop Failure
54	1.54	1936	H. P. Co. Hse.
54	.05	1942	U. S. Army
55	8.25	1936	U. S. Army
55	7.75	1936-37	H. P. Co. Camp Site
56	1.06	1937	T. of H.
56	.22	1939	U. S. Navy
56	.08	1943	U. S. Navy
57	.70	1937	T. of H.
57	.92	1942	U. S. Army
57	1.00	1943	Crop Failure
58	1.10	1942	T. of H.
59	3.24	1942	T. of H.
61	1.75	1937	T. of H.
61	.55	1939	U. S. Navy
61	3.36	1942	T. of H.
61	14.71	1943	U. S. Navy
62	17.58	1940	U. S. Navy
62	100.26	1942	U. S. Navy
63	3.27	1943	U. S. Army
65	.25	1941	H. P. Co. Loading Stat.
65	3.59	1942	T. of H.
66	.26	1940	H. P. Co. Shipon
66	1.07	1941	Clarke
67	30.26	1940	U. S. Navy
68	4.39	1940	Clarke
68	10.29	1940	U. S. Navy
68	3.46	1942	Clarke
69	69.93	1940	U. S. Navy
71	2.02	1936	Crop Failure
71	1.00	1942	U. S. Army
71	2.56	1943	U. S. Army
72	67.03	1940	U. S. Navy
73	50.30	1941	U. S. Army
74	1.29	1942	U. S. Army
75	7.36	1942	U. S. Army
77	.99	1938	H. P. Co. Rd.
77	67.29	1941-43	U. S. Navy
79	6.72	1940	U. S. Navy
79	1.50	1942	U. S. Army
79	5.26	1942	H. P. Co. Fallow
79	3.95	1943	U. S. Army

Field	Acres Lost	Year	To Whom
80	15.73	1939	U. S. Navy
81	.25	1938	Standard Dredging
81	50.78	1940	U. S. Navy
81	.98	1943	U. S. Navy
82	.45	1941	U. S. Army
82	.67	1942	T. of H.
82	46.50	1943	U. S. Navy
83	5.67	1942	T. of H.
83	1.00	1942	U. S. Army
83	65.50	1943	U. S. Navy
84	11.54	1942	Crop Failure
84	5.30	1943	Crop Failure
84	1.16	1943	T. of H.
85	3.43	1942	T. of H.
85	84.83	1943	U. S. Navy
86	5.32	1942	T. of H.
86	82.89	1943	U. S. Navy
87	2.77	1943	U. S. Army
87	.81	1938	Crop Failure
88	3.41	1942	U. S. Army
88	31.45	1942	U. S. Navy
88	12.81	1943	U. S. Navy
89	4.76	1941	T. of H.
89	2.51	1942	U. S. Army
89	29.45	1942	U. S. Navy
89	55.75	1934	Damon Estate
90	73.50	1934	Damon Estate
91	5.00	1934	Damon Estate
91	47.75	1941	U. S. Navy
92	40.30	1940	U. S. Navy
92	11.96	1941	U. S. Navy
93	58.27	1940	U. S. Navy
94	61.73	1940	U. S. Navy
95	27.25	1940	U. S. Army
95	26.66	1940	U. S. Navy
96	.97	1936	H. P. Co. Track
96	43.71	1940	U. S. Army
97	84.75	1935	U. S. Army
97 A&B	57.51	1940	U. S. Navy
98	66.50	1935	U. S. Army
99	86.75	1935	U. S. Army
100	18.75	1935	U. S. Army

Field	Acres Lost	Year	To Whom
101	42.50	1935	U. S. Army
102	55.50	1935	U. S. Army
103	85.50	1935	U. S. Army
104	75.00	1935	U. S. Army
105	50.50	1935	U. S. Army
106	28.75	1936	U. S. Army
107	19.50	1936	U. S. Army
107	.53	1938	Damon Estate
107	26.03	1942	U. S. Army
<hr/>			
Total	2479.66		

HONOLULU PLANTATION COMPANY

Summary of New Land Since 1-1-34

Year	Acres
1934	5.11
1935	15.65
1936	147.71
1937	195.36
1938	169.35
1939	43.67
1940	126.16
1941	220.82
1942	3.30
1943	5.82
<hr/>	
Total.....	932.95

HONOLULU PLANTATION COMPANY
Comparison of Water Distribution—1935 and 1943

Pump	Area		% of Total	
	Jan. 1	Oct. 1		
Dicharge	1935	1943	1935	1943
Above 500'	.....	295.25	....	7.61
500' - 450'	128.25	95.50	2.38	2.46
450' - 300'	724.50	593.50	13.42	15.30
300' - 200'	945.00	954.50	17.50	24.61
200' - 130'	1089.00	940.25	20.17	24.24
130' - 80'	644.25	623.25	11.93	16.07
80'	1867.75	376.50	34.60	9.71
Totals	5398.75	3878.75	100.00	100.00

Note: In 1935 with a total acreage of 5398.75 acres only 33.3% required pumping above 200'.

In 1943 with a total acreage reduced to 3878.75 acres 49.98% required pumping above 200'.

See relative costs hereto attached.

WATER DISTRIBUTION OF COSTS

Average elevation of Pump Discharges: 1/1/35.....208 feet
10/1/43.....282 feet

Therefore we are now pumping an average of 74 feet more than in 1935. This would amount to approximately \$2.96 per million gallons.

Estimate of present water needs..... 12,207.12 Million gals. per yr.
Increase in cost per year.....\$36,133.08

In addition, our man day performance has been considerably lowered due to loss of our flat, easy to irrigate areas:

Average Acres irrigated per man day, 1940..... 4.11
Average Acres irrigated per man day, Oct. 1943..... 2.33

This is an increase of \$.75 per acre for irrigating.
Increase in cost per year.....\$34,836.72

SUMMARY

Increased Water Cost Remaining Area.....\$36,133.08
Increased Labor Cost for Irrigating..... 34,836.72

Yearly Increase.....\$70,969.80

UNITED STATES EXHIBIT "J"

(Admitted in Evidence 1-14-47)

12 Jan., 1944

Copy

No. 937

C. Brewer and Company, Limited,
P. O. Box 3470,
Honolulu, T. H.

Attention: Mr. Philip E. Spalding, Attorney-
in-fact.

Gentlemen:

Receipt of your letter 5701-HTK, no date, is hereby acknowledged.

The plight of the Honolulu Plantation Company recited therein has been carefully studied. The continued operation of the sole refinery on Oahu is a matter of grave concern to the Navy and Army as the shipping thereby saved to the war effort is of moment. The Navy was supplied eleven million pounds of refined sugar in 1943 by your firm and the estimated requirements for 1944 for the Navy is thirty-three million pounds.

Your decision to operate the sugar refinery of the Honolulu Plantation Company for the duration of the war by purchasing raw sugar from other local producers is received with satisfaction.

Every effort has been exerted by the Navy to taking as little cane producing land on Oahu as possible. The various tracts were largely leased as actual and proved need arose, and the Navy al-

ways gave primary and full consideration to the condition of the growing crops in order to minimize crop damage. Marginal and waste lands were acquired rather than cane areas wherever possible.

The growth of the Navy Yard, Pearl Harbor and its satellite housing and storage activities has forced the conversion of certain adjacent lands to military uses. The geographical location of Honolulu Plantation Company-controlled lands close to the perimeter of Pearl Harbor and bordering the main territorial highway, was the principal factor contributing to its land losses. The principal of acquiring these lands only at the time of pressing need was one of common sense coupled with the determination to cause as little injury to the overall territorial economy as practicable. While the production loss to the Honolulu Plantation Company has been admittedly grave from the Company's viewpoint, I am sure you will agree that no lands or properties connected with the Honolulu Plantation Company were acquired by the Navy for any reason other than military necessity.

It is impossible at this time to state what future takings are in prospect from the present until the end of the war. There is no intention of deviating from the established principle of acquiring only those lands which are needed at the time they are taken, and to no greater extent than the Navy determines will be necessary in the successful prosecution of the war. That there will be more land needed for Naval purposes as the war progresses, is a fair assumption. Exactly where and

whose land will be acquired will have to await the exigencies of the moment.

For the foregoing reasons of policy, I cannot recommend the purchase of the entire properties and lands of the Honolulu Plantation Company nor can I foresee exactly what lands of your Company will be required by the Navy in the future.

Very truly yours,

ROBT. L. GHORMLEY,
Vice Admiral, U. S. Navy, Commandant, Fourteenth Naval District.

UNITED STATES EXHIBIT "K"

(Admitted in Evidence 1-14-47)

(Copy)

November 29, 1946

Honolulu Plantation Company, Limited
c/o C. Brewer & Company, Ltd.
Honolulu, T. H.

Gentlemen:

In response to your verbal invitation to submit for your consideration an offer to purchase certain of the assets of your Company, please be advised that we are now prepared to offer and do hereby offer you, subject to the conditions hereinafter set out, the sum of \$3,350,000.00, upon receipt of satisfactory conveyances and evidence of title, for all of the real property, improvements, equipment and

supplies on hand, owned or held by Honolulu Plantation Company, Limited, including, without limitation on the generality of the foregoing, all land, leaseholds, buildings and other structures, growing crops, livestock, water and water rights, pumps, wells, generators, all water and electric distribution systems, all trucks, tractors and other plantation equipment and machinery, the sugar mill and sugar refinery, including equipment and supplies; provided, however, that we will pay, in addition to the above amount, the actual cost, as shown by your books, of factory supplies on hand or in transit, of sugar in process of manufacture and of molasses stocks on hand, at date of transfer.

The above price is also subject to final adjustments on account of:

Unexpired insurance premiums.

Prepaid rents.

Other prepaid items.

Accrued accident compensation.

Accrued rentals.

Other accrued expense, if any, not liquidated by Honolulu Plantation Company, Limited.

The basis of said adjustments shall be the books and records of your Company, subject to audit by us. It is understood that the purchaser will assume no obligations in connection with compensation, bonuses or pensions due or payable to the plantation personnel, on account of or arising from services performed prior to date of transfer of the properties to Oahu Sugar Company, Limited (except settlements with cultivation or irrigation con-

tractors on unharvested cane); that all 1946 taxes will be paid by the seller, and that the purchaser be held harmless against all claims for damages of whatever nature arising from or by virtue of the ownership or operation of the property involved prior to date of transfer.

As you know, California & Hawaiian Sugar Refining Corporation, Limited has made an offer to Oahu Sugar Company, Limited to purchase the Mill and Refinery and the sites thereof, upon their acquisition by Oahu from you. That transaction will require the approval of the Plantations and Trustees concerned, in accordance with the provisions of the Cooperative Agreement, dated November 1, 1938, and Oahu's offer to purchase from you the properties hereinbefore mentioned, is subject to and contingent upon the execution of a firm agreement between Oahu and California & Hawaiian Sugar Refining Corporation, Limited for the purchase by the latter of the Mill, Refinery and sites therefor, and the approval of the Plantations and Trustees to such agreement and the transfer of title to California & Hawaiian Sugar Refining Corporation, Limited thereunder.

The foregoing offer is made on the assumption that the properties will be delivered to Oahu Sugar Company, Limited on December 31, 1946 and on the further assumption that in the interim period growing cane will be cared for according to the usual practices of good husbandry, and that stocks of plantation supplies shall be depleted only in accordance with normal plantation uses and prac-

tices. Failure to meet these assumptions shall entitle us to either withdraw or revise this offer.

Very truly yours,

OAHU SUGAR COMPANY,
LIMITED,

By /s/ H. A. WALKER,
President,

By /s/ S. M. LOWREY,
Treasurer.

UNITED STATES EXHIBIT "L"

(Admitted in Evidence 1-14-47)

(Copy)

December 3, 1946

Honolulu Plantation Co., Ltd.,
c/o C. Brewer & Co., Ltd.,

Gentlemen:

Referring to our letter of November 29th, 1946, conveying an offer to purchase certain of the assets of your Company, we herewith supplement said offer as follows:

Should your Company enter into contracts with pineapple canners in the Territory of Hawaii for their 1947 refined sugar requirements on substantially the same terms and conditions of sale as in 1946, we agree to assume and perform such contracts, in the event said offer to purchase is accepted.

We also hereby amend our abovementioned offer so that the delivery date referred to in the last paragraph thereof shall read "January 1st, 1947" instead of "December 31st, 1946".

Yours very truly,

OAHU SUGAR COMPANY,
LIMITED,

By /s/ H. A. WALKER,
President,
and

By /s/ S. M. LOWREY,
Treasurer.

UNITED STATES EXHIBIT "M"

(Admitted in Evidence 1-14-47)

(Copy)

December 6, 1946

Honolulu Plantation Company,
c/o C. Brewer & Co., Ltd.,
Honolulu, T. H.

Gentlemen:

We confirm our cable of today reading as follows:

"Referring our letter November 29th offering certain assets of your company we hereby increase price offered in first paragraph to three million seven hundred fifty thousand dollars will confirm by letter".

The sum of \$3,350,000.00 mentioned in the first

paragraph of our later of November 29th, 1946, in which we offered to purchase certain of the assets of your Company, is hereby increased to \$3,750,000.00.

Yours very truly,

OAHU SUGAR COMPANY,
LIMITED,

By /s/ H. A. W.,
Its President,
and

By /s/ S. M. L.,
Its Treasurer.

UNITED STATES EXHIBIT N-1

(Admitted in Evidence 1-14-47)

C. Brewer and Company

January 1, 1947

Oahu Sugar Company, Limited
c/o American Factors, Limited
Honolulu, T. H.

Gentlemen:

This will acknowledge receipt of your letters dated November 29, 1946, December 3, 1946, and December 6, 1946, containing an offer to purchase certain described properties from Honolulu Plantation Co. Under the authority vested in the undersigned in a resolution duly adopted by the Directors of Honolulu Plantation Company in meeting held December 6,

1946, and approved by the stockholders of the Company in meeting held December 23, 1946, your offer is hereby accepted. It is understood that the terms of the agreement as consummated by your offer and this acceptance are those terms set forth in your said letters of November 29, 1946, December 3, 1946 and December 6, 1946, true copies of which are hereto attached and by reference made a part hereof. Copy of said resolution is likewise attached.

It is further understood that this agreement shall become effective and binding upon the parties as of this date, January 1, 1947. Delivery of the requisite documents of conveyance and other documents necessary to evidence the transfer of title shall be made by the seller as soon as the same may be conveniently prepared.

Payment for the properties shall be made as follows:

1. On January 2, 1947 the sum of \$750,000 on account of the purchase price of \$3,750,000.

2. On January 2, 1947 an amount in accordance with bills of sale to be delivered by Honolulu Plantation Company for—

- a. Inventory of factory supplies.
- b. Raw sugar in process.
- c. Raw sugar on hand.
- d. Molasses on hand.
- e. Such other items if any herein sold but not included in the purchase price of \$3,750,000.00.

3. Upon delivery of deed and other requisite documents of conveyance for the approximate

twenty-one acres, (specified as the mill site), and all erections, machinery, equipment and movable property thereon, the sum of \$1,000,000 on account of the said purchase price.

4. Upon delivery of deeds for the remaining fee simple land owned by Honolulu Plantation Company, together with all erections, machinery and improvements thereon, the sum of \$1,000,000 on account of the said purchase price.

5. Upon delivery of the assignments for the leaseholds held by Honolulu Plantation Company, together with the requisite documents conveying the growing crops and all right, title and interest held by the lessee in the improvements on the leased lands, the sum of \$1,000,000 as final payment of said purchase price.

6. Adjustment of all prepaid items to be made promptly upon their determination.

It is the understanding of Honolulu Plantation Company that the properties subject to the sale agreed upon are those generally described in your said letters of November 29, 1946, December 3, 1946 and December 6, 1946 and the Company's good will, trade names, brands and marks with all registered and patented rights thereto appertaining to the Company's refinery business specifically included per your oral request, but excluding of course those items of property, tangible and intangible, owned and held by Honolulu Plantation Company not reasonably coming within the classification of the properties enumerated and the intent of the parties. In this connection it is the further

understanding of Honolulu Plantation Company that in the assignment of its leases specific reservation will be made protecting the assignor in its prosecution of claims against the Federal Government for damages heretofore sustained by it due to condemnation takings.

Very truly yours,

HONOLULU PLANTATION
COMPANY,

By P. E. SPALDING,

Its Vice President, acting under the authority of the Resolution of the Directors dated December 6, 1946, and approved by the stockholders December 23, 1946.

UNITED STATES EXHIBIT N-2

(Admitted in Evidence 1-14-47)

RESOLUTION AUTHORIZING SALE OF
PROPERTIES

(Copy)

Whereas, this corporation, Honolulu Plantation Company, has received an offer from Oahu Sugar Co., Ltd. to purchase this corporation's mill, plantation and related properties for the sum of \$3,750,000.00 and to purchase at cost all factory supplies and sugar and molasses stocks on hand, all as of January 1, 1947; and

Whereas, said offer has been presented to this meeting of the Board of Directors:

Now, Therefore, Be It Resolved, That the officers of this corporation, or any of them, be and are hereby authorized and empowered, upon obtaining the approval of this resolution by the vote or written consent of the holders of a majority of the outstanding shares of this corporation, to sell said properties and assets at the price and on the terms set forth in said offer, with such modifications therein as said officers may approve, except that the price shall be approximately that contained in said offer; and

Be It Further Resolved, That the execution by said officers, or any of them of the necessary documents to effectuate said sale shall constitute evidence of approval of the terms of said sale by the officers of this corporation for all purposes hereof; and

Be It Further Resolved, that said officers, or any of them, be and they are hereby authorized and empowered for and on behalf of this corporation to do and perform all acts and things necessary or desirable to effectuate said sale and to carry out the purposes of this resolution.

[Endorsed]: No. 12023. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Honolulu Plantation Company, Appellee, and Honolulu Plantation Company, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Hawaii.

Filed August 14, 1948.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12023

UNITED STATES OF AMERICA,

Appellant,

vs.

HONOLULU PLANTATION CO.,

Appellee.

and

HONOLULU PLANTATION CO.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

ORDER EXTENDING TIME TO FILE TRAN-
SCRIPT OF RECORD AND DOCKET
CAUSE

Upon application of Mr. A. Devitt Vanech, Assistant United States Attorney General, counsel for appellant United States of America in above cause, and good cause therefor appearing, It Is Ordered that the time within which the certified transcript of record on the appeals taken herein may be filed and cause docketed in this court be, and hereby is extended to and including June 5, 1948.

/s/ WILLIAM DENMAN,

United States Circuit Judge

Dated: San Francisco, Calif., April 26, 1948.

[Endorsed]: Filed April 26, 1948. Paul P. O'Brien.
Clerk.

[Title of U. S. Court of Appeals and Cause.]

ORDER EXTENDING TIME TO FILE TRAN-
SCRIPT OF RECORD AND DOCKET
CAUSE

Upon application of Mr. A. Devitt Vanech, Assistant United States Attorney, counsel for appellant United States of America in above cause, and good cause therefor appearing, It Is Ordered that the time within which the certified transcript of record on the appeals taken herein may be filed and cause docketed in this court be, and hereby is extended to and including September 7, 1948.

/s/ FRANCIS A. GARRECHT,
Senior United States Circuit Judge.

Dated: San Francisco, Calif., May 14, 1948.

[Endorsed]: Filed May 14, 1948. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

STATEMENT OF POINTS AND DESIGNA-
TION OF THE PORTIONS OF THE RECORD
TO BE PRINTED

The United States of America, appellant in the above-entitled cause, adopts the statement of points filed in the District Court as the statement of points to be relied upon in this Court, and desires that of the record as filed by it and certified there should be printed everything but the "Record of Proceedings at the trial" (fourth item from the bottom of page

7 of the designation of the record filed in the District Court). The United States of America designates for printing that part of the "Record of Proceedings at the trial" which begins at page 258 of the type-written transcript and ends at the close of the trial, containing the testimony of Stafford L. Austin, George E. Schmutz, Charles Campbell Crozier and Philip E. Spalding.

/s/ A. DEVITT VANECH,
Assistant Attorney General.

/s/ JOHN F. COTTER,
Attorney, Department of Justice
Washington, D. C.

[Endorsed]: Filed September 13, 1948. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

STATEMENT OF POINTS AND DESIGNA-
TION OF ADDITIONAL PORTIONS OF
THE RECORD TO BE PRINTED

Honolulu Plantation Company, cross-appellant and appellee in the above entitled cause, adopts the statement of points filed in the District Court as the statement of points to be relied upon in this Court, and designaes the following matters to be printed in addition to the matters designated by appellant:

1. Honolulu Plantation Company's Notice of Cross-Appeal.

2. Statement of Points on Which Cross-Appellant Intends to Rely.

3. Government's Order Extending Time to Docket Record on Appeal.

4. Honolulu Plantation Company's Order Extending Time to Docket Record on Appeal.

5. Designation of the above matters.

* * * *

Dated: Honolulu, T. H., September 16, 1948.

/s/ C. NILS TAVARES,

Attorney for Honolulu Plantation Company.

[Endorsed]: Filed September 20, 1948. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

STIPULATION AND APPLICATION

It Is Hereby Stipulated by and between the parties hereto that this application be made to the Court for an order relieving said parties from printing or reproducing Exhibits Nos. 1, 2, 2-A, 2-B, 2-C, 3 and 8 of Honolulu Plantation Company, defendant in the trial of this cause in the District Court, and hereby requesting that the Court consider the said Exhibits in their original form without reproduction.

This application is made pursuant to Rule 19 of the Ninth Circuit Court of Appeals because said Exhibits are maps not of a printable type.

This application is based on the record filed herein

and on the affidavit of C. Nils Tavares, attorney for Honolulu Plantation Company, attached hereto.

Dated: Honolulu, T. H.,, 1948.

/s/ A. DEVITT VANECH,
Assistant Attorney General of the United States of
America.

/s/ JOHN F. COTTER,
Attorneys for United States of America, Cross-Appellee and Appellant.

/s/ C. NILS TAVARES,
Attorneys for Honolulu Plantation Company, Cross-Appellant and Appellee.

So Ordered:

/s/ CLIFTON MATHEWS,
Judge, U. S. Court of Appeals for the Ninth Circuit.

AFFIDAVIT

Territory of Hawaii,
City and County of Honolulu—ss.

C. Nils Tavares, being first duly sworn, on oath deposes and says:

That he is the attorney for the Honolulu Plantation Company, cross-appellant and appellee herein, and that he makes this affidavit in support of an application for an order of the Court relieving the parties from printing or reproducing Honolulu Plantation Company Exhibits Nos. 1, 2, 2-A, 2-B, 2-C, 3 and 8 to which it is attached;

That said Exhibits are maps of an unprintable

type and for that reason may not be designated by cross-appellant and appellee herein to be printed as part of the record;

That it is necessary that said Exhibits be considered by the Court in its determination of this cause; and that unless said application be granted and the parties hereto relieved from printing or reproducing said Exhibits and the Exhibits considered by the Court in their original form without reproduction, said cross-appellant and appellee will be seriously prejudiced upon the trial of this cause.

Further affiant sayeth not.

/s/ C. NILS TAVARES.

Subscribed and sworn to before me this 16th day of September, 1948.

(Seal) /s/ MAIZIE M. JOINER,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

My commission expires Jan. 19, 1952.

[Endorsed]: Filed September 27, 1948. Paul P.
O'Brien, Clerk.

In the United States Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

HONOLULU PLANTATION COMPANY, APPELLEE

and

HONOLULU PLANTATION COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

BRIEF FOR THE UNITED STATES, APPELLANT

A. DEVITT VANECH,
Assistant Attorney General.

JOHN F. COTTER,
*Attorney, Department of Justice,
Washington, D. C.*

FILED
MAR 5 1942



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**In the United States Court of Appeals
for the Ninth Circuit**

No. 12,023

UNITED STATES OF AMERICA, APPELLANT

v.

HONOLULU PLANTATION COMPANY, APPELLEE

and

HONOLULU PLANTATION COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

*UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII*

BRIEF FOR THE UNITED STATES, APPELLANT

OPINION BELOW

The opinion of the district court (R. 461-504) is reported at 72 F. Supp. 903.

JURISDICTION

This is an appeal from a judgment entered November 5, 1947 (R. 504-507). On February 3, 1948, the United States filed notice of appeal (R. 508). The jurisdiction of this Court is invoked under section 128 of the Judicial Code, as amended, 28 U. S. C. sec. 225(a), now 28 U. S. C. sec. 1291.

The United States instituted in the district court 13 suits to condemn land.¹ On February 17, 1945, in so far as they concerned the Honolulu Plantation Company, seven of these suits were consolidated (R. 433). On November 22, 1946, the remaining six and the previously consolidated proceedings were consolidated (R. 459-460). The jurisdiction of the district court was invoked under section 201 of the Act of March 27, 1942, 56 Stat. 176, 177, 50 U. S. C. sec. 171(a) (R. 11, 37, 71, 91, 110, 195, 201, 226, 298, 324, 355, 372, 398).

QUESTION PRESENTED

Whether, when there is no claim for compensation for property condemned but only for the resultant diminution in the value of the remainder, an award may be sustained where the only evidence was as to the difference between the value of the whole before the taking and the value of the remainder thereafter.

STATEMENT

Between June 21, 1944, and December 6, 1945, the United States instituted 13 suits to condemn land in Hawaii needed by the Navy. In consequence, the Honolulu Plantation Company made a number of claims for compensation. To some extent these claims have been disposed of. Thus, prior to the trial of the instant case, the company was paid \$285,000, the agreed value of sugar cane growing on some of the land (R. 437-440). Further, in this case by provisions of the judgment not embraced by this appeal, it was awarded \$38,988 for the fee to 4.836 acres and \$15,585 for parts of an irrigation ditch (R. 504-507). However, the judgment also awards the company \$440,175 for damages allegedly inflicted upon its remaining property by the condemnation of 440.175 acres which it was using to grow sugar cane. From that award this appeal has been taken.

The Honolulu Plantation Company grew sugar cane which it converted into sugar (R. 530, 574). The company had a

¹ The pleadings in these cases are found in Volume I of the printed record. A summary of the filing dates is found at R. 5-8.

refinery and other auxiliary works (R. 544-551). The lands were served by an irrigation system (R. 535-540). When the first of these suits was commenced, the company was using about 4300 acres for the growing of cane (R. 552, 586, 687). When the last had been filed, 1087.59 acres of the growing area had been condemned.

It developed that the company owned 2.912 of these acres (Ex. 12, R. 1537; R. 496). The rest it claimed to have under lease. But it did not seek any part of the compensation due for any of the acreage. It contended, however, that the value of the land and structures remaining to it was diminished by the loss of the 1087.59 acres and that consequently it was entitled to severance damages. In support of the assertion, it made the following showing:

The cane grown on the 4300 acres could be converted into 22,000 tons of raw sugar (R. 569, 689, 1050). The 1087.59 acres could not be replaced (R. 1063) and the remaining lands would produce only 15,000 tons (R. 570-571, 689, 1050). In the judgment of those managing the company it was not practicable to make up the difference by purchases (R. 570, 1064-1065). Consequently, the refinery, which could produce annually from 30,000 to 35,000 tons of raw sugar (R. 567), had even more surplus capacity than before. The irrigation system also was larger than was warranted by the smaller growing area (R. 572, 1055-1056).

The company called Messrs. S. L. Austin, G. L. Schmutz and C. C. Crozier to testify to the damage. Each valued the plantation at about \$1,000 per acre of cane-growing lands (R. 606, 687, 688, 736, 739, 873). They first testified to its value before the takings: Austin who thought that at that time there were about 4,300 acres of cane lands (R. 552) valued the plantation at \$4,300,000 (R. 582; see R. 578). Schmutz on the assumption of 4,283 acres (R. 687, 733) valued at \$4,200,000 (R. 686; see R. 679). On the basis of 4,400 acres Crozier believed it was worth \$4,000,000 (R. 873). Next, testifying as to value of the plantation after loss of the 1,087.59 acres, each concluded that it was then

worth about \$1,000,000 less than before (R. 582-583, 687, 890).²

Each explained his use of the \$1,000-an-acre figure. Mr. Austin said it was "more or less the rule of thumb * * * from the standpoint of taking values and from talking to others, and the amount of capital required for a plantation the size of Honolulu Plantation Company, for putting in all the various equipment necessary to run a plantation that it would come to about that figure" (R. 606). Mr. Schmutz testified that it was the "common notion in the community regarding the investment in irrigated cane lands per acre, which was \$1,000 an acre for plantations which did not have a refinery"³ (R. 688). Mr. Crozier said: "Well, it's one of the methods that can be developed as the rate per acre for a leasehold plantation insofar as the value of money in an enterprise, in its capital as a leasehold plantation, to operate and produce sugar. And that will vary with the size and many factors in it. But I should imagine that the 30, the 25,000 ton plantation, as a leasehold, would require * * * a thousand dollars per acre of capital to carry on the enterprise, starting with the virgin land * * * and weeding it, fencing it, and the ditches and everything else that goes with the enterprise" (R. 873).

Use of the rule automatically produces valuations. If, for example, the plantation had comprised 5,500 acres of leased land, it would have been worth approximately \$5,500,000 (R. 593). In case it had lost any of these lands, its value would have diminished at the rate of \$1,000 per acre lost (R. 604-606). Specifically, if before the takings here

² As of January 1, 1947 (R. 1067), the remaining physical assets were sold to the Oahu Sugar Company for \$3,750,000 (R. 1149). Net current assets excluded from the sale amounted to \$1,000,000 (R. 1151). Mr. P. E. Spalding testified that Oahu bought the properties because it had lost cane lands (R. 1073) and that it was selling the refinery—the only one in Hawaii (R. 1102)—to California and Hawaiian Sugar Refining Company for \$1,250,000 (R. 1104).

³ Schmutz testified he took into account eight factors (R. 676-678). However, it is evident he was controlled by the \$1,000-an-acre measure (R. 687, 688, 706, 708, 736). This was the construction put on his testimony by the trial court (R. 489).

involved, the leased lands of the company did not include the 1087.59 acres considered by the witnesses, its value at that time was not the amount arrived at by them but whatever result would be reached by applying \$1,000 to the acreage in fact under lease (R. 706, 708, 736, 888).

As has been said (p. 2, *supra*), the trial court awarded the company \$440,175. Thus, it accepted—with evident reluctance—the theory of valuation proposed by the company's witnesses. As it said (R. 489-491):

Here, to say the least, the situation is confusing. First, the evidence reveals that this claim formed a part of a larger claim made to the 79th Congress, and the Company represented to Congress in unmistakable language that it was asking for relief at its hands because it had suffered a capital or business loss for which it had no remedy at law.⁴

Secondly, though a prudent buyer, to be sure, would take general note of all the factors mentioned by the experts [Schmutz and Crozier], nevertheless stripped of all the generalities, the experts essentially base their judgment upon the same point as the former plantation manager [Austin], that is, all said that the Company suffered a capital loss at the rate of \$1,000 per cane acre as it takes that number of dollars to turn virgin land into land capable of growing sugar cane successfully. Thus far, as before Congress, the Company is talking the language of a capital loss. But here [the Company] takes a step beyond, and

Thirdly, envelopes itself in the language of [*Baetjer v. United States*, 143 F. 2d 391 (C.C.A. 1, 1944), certiorari denied 323 U. S. 772]. At this point the witnesses, carrying forward the picture of what has happened, theoretically place what is left upon the block in the market place and then, viewing it from the eyes of a buyer, say with the First Circuit Court that it is not worth the amount of invested capital which it represents but something substantially less, and

⁴ The claim itself is not in the printed record. A favorable report of the Committee on Claims of the House of Representatives together with disapproving letters from the Attorney General, the Secretary of the Navy and the Acting Secretary of War (H. Rep. No. 1313, 79th Cong. 1st sess.) is found at R. 1542-1566.

therefore what has happened to the Company has depreciated the value of its remaining property.

It would seem that as if by magic a noncompensable capital loss has now become a loss of real property value.

* * * Here all the evidence and the only evidence, as given by two expert appraisers and two men experienced in plantation affairs, is that the over-capacity of the mill due to the limited acreage available to supply it not only made the Company economically unprofitable but those same facts depreciated the market value of the remaining property, for a buyer being able to do no better than the Company could in this situation would pay less, at the rate of \$1,000 an acre for each cane acre taken, for what was left of the plantation's physical property and its permanent improvements.

Although not a little disturbed by the facility by which an admitted capital or business loss is transformed into a loss of real property value, theory must yield to the reality of the market price where values are established.

* * * * Considered in this practical light, I am satisfied by the evidence that the Company has proven its claim that its remaining property decreased in value at the rate of \$1,000 an acre for each cane acre taken.

However, the trial court declined to apply the \$1,000-per-acre figure to the 1,087.59 acres considered by the company's witnesses. It found that 598.795 acres were being used by sufferance (R. 492, 497-503) and 48.61 acres under a lease which entitled the lessor to all compensation if the land was condemned (R. 493, 1351-1352). It found the remaining 440.175 acres had been valuable to the company (R. 496). Of these, 2.912 acres were owned by the company. The rest were occupied under leases by which in the event of condemnation the company relinquished its right to share in the compensation awarded for the leased land but was permitted to claim for damages to its remaining properties "so long as such action or the payment of such damages shall not affect nor diminish the compensation payable to the Lessors" (Ex. 9-G, R. 1443-1444; Ex. 9-I, R. 1468-1469; Ex. 9-J, R. 1500-1501).

SPECIFICATIONS OF ERROR

The statement of points relied on by the United States on its appeal (R. 512) is as follows:

The district court erred:

1. In holding that the Honolulu Plantation Company was entitled to severance damages.
2. In making any award to the Honolulu Plantation Company on account of severance damages.
3. In awarding the Honolulu Plantation Company \$440,-175 as severance damages.

SUMMARY OF ARGUMENT

Where part of a tract of land is taken, just compensation includes, in addition to the value of the part taken, any diminution in the value of the remainder caused by the taking, or "severance damages." The measure of that compensation is the difference between the value of the whole before the taking and the value thereafter of the remainder—a measure which necessarily comprehends the value of what has been taken.

Here, by clauses contained in the leases, the company had relinquished to the fee owners its interest in the value of the condemned land. Nonetheless, it claimed as severance damages the difference between the value of the whole before the taking and of the remainder thereafter. On this basis the court made its award. But this difference represents the relinquished interest in the condemned land and not a diminution in the value of the remainder. This is disclosed by an application the company made to Congress for relief from the loss suffered because of this relinquishment.

Although the company had contracted to relinquish its interest in the leased lands in event of condemnation, this interest contributed to the pre-condemnation value of the plantation. So when the company's witnesses testified to that value they included the increment in value created by the company. And when they testified to the value of the remainder, they excluded the increment because, condemnation having occurred, it had passed to the owners. Con-

sequently, the difference between the two figures represents the value of the land taken.

There was no proof that, as the trial court seemed to think, the company's "remaining property decreased in value at the rate of \$1,000 an acre for each cane acre taken" (R. 491). The testimony merely was that each cane acre taken diminished the value of the whole plantation by \$1,000. The remainder was worth as much as it had been worth when part of the larger plantation.

The decision in *Bactjer v. United States*, 143 F. 2d 391, 396 (C.C.A 1, 1944), certiorari denied 323 U. S. 772, is not in point. In the instant case, there was no testimony that the claimed damages to the remainder occurred because the company had become unprofitable. Therefore, there is no occasion to consider whether, as was the view of the *Baetjer* opinion, the inability profitably to operate the remainder would diminish its market value and so give rise to severance damages.

ARGUMENT

The Award Is for the Land That Was Taken and Not for Damages to the Remaining Land

In case part of a tract of land is taken, just compensation includes, in addition to the value of the part taken, any diminution in the value of the remainder caused by the taking, or "severance damages." *Bauman v. Ross*, 167 U. S. 548, 574 (1897); *Sharp v. United States*, 191 U. S. 341, 351-352, 354 (1903); *United States v. Grizzard*, 219 U. S. 180, 183-185 (1911); *United States v. Miller*, 317 U. S. 369, 376 (1943); cf. *Campbell v. United States*, 266 U. S. 368 (1924). Accordingly, where damages to the remainder are established, the measure of compensation is the difference between the value of the whole tract before the taking and the value thereafter of the remainder. *Stephenson Brick Co. v. United States*, 110 F. 2d 360 (C. C. A. 5, 1940); *Bactjer v. United States*, 143 F. 2d 391, 396 (C. C. A. 1, 1944), certiorari denied 323 U. S. 772; *Porrata v. United States*, 158 F. 2d 788, 789-790 (C. C. A. 1, 1947); cf. *Puget Sound Power & L. Co. v. Public Utility Dist. No. 1*, 123 F. 2d 286, 290 (C. C. A. 9, 1941), certiorari denied 315 U. S.

814. This measure necessarily comprehends the value of the land that has been taken as well as the diminution in value suffered by the remainder.

Here the company could not claim any part of the value of the condemned land. For, as the Statement shows (p. 6, *supra*), it had relinquished to the fee owners whatever interest in that land its expenditures had created. Nonetheless it claimed the difference between the value of the whole plantation before the takings and the value of the remainder thereafter. And on this basis the trial court made its award. It can be sustained only if the entire difference represents (as the company claimed) a diminution in the value of the remainder and that—unlike what would be usual—none of it is attributable to the land that was taken. As it happens, the difference can be identified. This is so because, before the trial of this case, the company had applied to Congress for relief (see Statement, p. 5, *supra*). A comparison of that application and this claim makes plain that the difference represents the interest in the condemned land which the company relinquished to the fee owners and not a diminution in value of the remainder of the plantation.

Concerning the application to Congress, the trial court said that (R. 489): “the Company represented to Congress in unmistakable language that it was asking for relief at its hands because it had suffered a capital or business loss for which it had no remedy at law.” The nature of that loss was described in the report of the House Committee on Claims (R. 1542-1566). Referring to an exhibit prepared by the company, the Committee said (R. 1550): “It showed that * * * plantations had an average investment of \$1,023 per acre of arable sugar cane-producing lands, and that actual investment in capital of this claimant in 1939 before any expropriations of leased lands had occurred was \$983 for every acre in production. After the takings the exhibit showed that the investment for the same purpose rose to \$1,512 per acre.” (This conforms to the testimony at the trial which was (R. 489) “that the Company suffered a capital loss at the rate of \$1,000 per cane acre as it takes

that number of dollars to turn virgin land into land capable of growing sugar cane successfully.'') The Committee report ascribed the company's loss to the fact (R. 1553-1554): "that each of the leases upon the lands referred to in all of the aforesaid condemnation suits contained identical clauses inserted on the insistence of the lessors and which clause terminated the lessee's interest in any lands leased upon condemnation thereof. Thus, the claimant had no recourse but to appeal to Congress * * *." ⁵ In other words: The company had invested in leased cane land at the rate of about \$1,000 an acre. It had relinquished to the lessors its right in case of condemnation of such land to share in the compensation. As a result of this relinquishment it had lost what it invested. In short, the company had lost the money it had invested in the condemned lands. But since this loss resulted from the company's agreements with its lessors and not from the Government's condemnation of the land, the company had no claim against the Government. Hence, the petition to Congress.

However, the presence of these condemnation clauses did not alter the fact that the company's expenditures enhanced the value of the plantation. Pre-condemnation value was the same as it would have been in the absence of these provisions. The value of property does not depend upon the agreements made by those interested in it as to disposition of the proceeds in the event of sale or other alienation.

So, when to support its claim for severance damages the company had its witnesses testify to the value of the plantation before the takings, it is plain that this value embraced the interest or increment in value created by the company's investments. And when the same witnesses testified to the value of the remainder, it is equally plain that they excluded this element because, condemnation having occurred, it had

⁵ In its "Summary," the Committee found (R. 1554): "That the claimant conducted its business according to the accepted and long-established business customs in the Territory of Hawaii but is without legal remedy because of the termination of its contractual rights under the terms of its leases which were drawn in accordance with standards of business prevailing in Hawaii."

ceased to belong to the company. This being so, there can be no doubt that the difference between the two figures represents value of the land taken and not a diminution in the value of the remainder of the plantation.

The conclusion can be proved by considering the situation which would have existed if the leases had not contained condemnation clauses. In that event the company would have shared in the compensation paid for the fee value of the leased lands and as a result would have recovered its investment. Having so recouped, it could not have obtained it again in the guise of severance damages. Certainly, its self-imposed inability to recoup does not enlarge the constitutional liability of the United States.

It is thus apparent that the testimony that—as it was accurately summarized by the trial court (R. 490)—“a buyer * * * would pay less, at the rate of \$1,000 an acre for each cane acre taken, for what was left of the plantation’s physical property and its permanent improvements” did not, as the court deduced (R. 491) show that the company had “proven its claim that its remaining property decreased in value at the rate of \$1,000 an acre for each cane acre taken.” The testimony simply showed that each cane acre taken diminished the value of the plantation—or the company—by \$1,000. The remainder, however, was worth as much as it had been worth when part of the larger plantation. Therefore, it was not diminished in value by the reduction in size effected by the takings. The correctness of this can be illustrated:

First. In valuing the property, the company’s witnesses proceeded on the theory that value could be determined by multiplying the number of acres under lease by \$1,000. According to them, an added acre increased the aggregate by \$1,000; an acre taken away subtracted \$1,000 from the total. Each acre was worth the same. In this fashion they valued the 4300 acres (before the takings) at about \$4,000,000 and the remaining acreage at \$1,000,000 less. Since the smaller number of acres was valued at the same rate per acre as the larger number, it must follow that the value of the smaller number, *i.e.*, the remainder of the plantation,

was not diminished by severance from the condemned acreage.

Second. If the remaining property had "decreased in value at the rate of \$1,000 an acre for each cane acre taken," the value before the takings of that property as distinguished from all the property is ascertainable. Use may be made of the typical valuations of Mr. Schmutz. On the basis of 4,283 acres (R. 687), he valued the plantation at \$4,200,000 (R. 686). On the assumption that the condemned lands included 1,087 leased acres, he valued the remainder of the plantation (4,283 acres minus 1,087 acres, or 3,196 acres) at \$3,113,000 (R. 687). Now if by the takings the remaining property had decreased in value at the rate of \$1,000 for each acre taken, then it would follow that before the takings the same property was worth \$3,113,000 (its subsequent value) plus \$1,087,000 (1,087 acres multiplied by \$1,000) or \$4,200,000. But since the testimony was that value could be determined by multiplying the number of leased acres by \$1,000, the 3,113 acres could never have been worth \$4,200,000. On the contrary, it is plain they were always worth \$3,113,000. Therefore, their value was not diminished by the takings.

Since the company's loss resulted from the condemnation clauses in its leases it is evident that, although its witnesses testified that as a result of the takings the plantation became unprofitable because its improvements were excessive, they did not ascribe the value of the remainder to that fact. Consequently, there is no need to consider whether—as was thought in *Baetjer v. United States*, 143 F. 2d 391, 396 (C.C.A. 1, 1944), certiorari denied 323 U. S. 772—the inability profitably to operate the remainder would diminish its market value and so give rise to severance damages.⁶ On the record in the *Baetjer* case, that decision may be correct. But

⁶ After a petition by the Government for certiorari was denied, 323 U. S. 772, the trial court heard testimony and found that while the owners had suffered a business loss, there was no evidence that the remaining properties had depreciated in value. *United States v. 7936.6 Acres of Land*, 69 F. Supp. 328, 332 (P. R. 1947). That ended the case.

since sugar plantations are rarely bought and sold and it is therefore necessary to call on "experts," the danger that they will transform a business loss into a diminution of market value is apparent. *United States v. Certain Land*, 79 F. Supp. 873, 876-877 (S.D. N.Y. 1948). This danger is illustrated by the fact that in this case, the able and candid trial court—erroneously supposing that the company's witnesses were testifying to a diminution in value of the real property resulting from conversion of a profitable business into a losing one—was confused and disturbed by the "magic" of the experts and yet felt compelled to yield to them and to enter the judgment appealed from.

Fortunately, this result need not be accepted. For as has been demonstrated, the *Baetjer* decision (which in any event would not control this Court) is not in point. And, since the difference between the value of the whole plantation before the takings and the value of the remainder thereafter is attributable to the land that was taken, the award of damages for the remainder is wrong.

CONCLUSION

For the foregoing reasons, it is submitted that so much of the judgment as awards the company compensation for "severance damages" should be reversed.

Respectfully,

A. DEVITT VANECH,
Assistant Attorney General.

JOHN F. COTTER,
Attorney, Department of Justice,
Washington, D. C.

MARCH 1949.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,
vs.
HONOLULU PLANTATION COMPANY,
Appellee,
and
HONOLULU PLANTATION COMPANY,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

**BRIEF FOR
HONOLULU PLANTATION COMPANY,
APPELLEE**

**On Appeal from the United States District Court
For the District of Hawaii**

C. NILS TAVARES

VERNON O. BORTZ

Attorneys for Appellee

Honolulu Plantation Company

Of Counsel:

PRATT, TAVARES & CASSIDY

Alexander & Baldwin Bldg.

Honolulu, T. H.

FILED

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PAUL P. O'BRIEN,
CLERK



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IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	<i>Appellant,</i>
vs.	
HONOLULU PLANTATION COMPANY,	<i>Appellee,</i>
and	
HONOLULU PLANTATION COMPANY,	<i>Appellant,</i>
vs.	
UNITED STATES OF AMERICA,	<i>Appellee.</i>

**BRIEF FOR
HONOLULU PLANTATION COMPANY,
APPELLEE**

**On Appeal from the United States District Court
For the District of Hawaii**

OPINION BELOW

The opinion of the district court (R. 461-504) is reported at 72 F. Supp. 903.

JURISDICTION

This is an appeal and cross-appeal from a judgment entered November 5, 1947 (R. 504-507).

On February 3, 1948, within the time prescribed by law, the United States of America, petitioner in the Court below, duly filed a notice of appeal to this Court (R. p. 508) and on the same date the Honolulu Plantation Company duly filed a notice of cross-appeal to this Court (R. p. 509). Said appeal and said cross-appeal have been perfected to this Court.

The jurisdiction of this Court is invoked under the provisions of Section 128 of the Judicial Code, as amended, now 28 U.S.C. Sec. 1291.

STATEMENT OF THE CASE

The statement of the case on pages 2 to 6 of the Government's opening brief is substantially correct, although the Appellee does take exception to certain of the remarks of the Appellant with reference to some of the testimony. The Court is referred to the statement of the case set forth in cross-appellants' opening brief at Pages 4 to 6 which more fully states the position of the Appellee.

QUESTION INVOLVED

It is submitted that the question presented by the Government in its opening brief is too narrow in its scope. The real question presented in the case is:

Whether, where real property condemned by the United States is a part of a larger tract which at the time of the takings was used as a sugar plantation, and after the takings, the plantation properties, including the mill, irrigation system, railroad, roads and the like were depreciated in value because of the severance of the real property taken from the properties operated as a unit by the plantation, an award for severance damages may be sustained where the plantation adduced evidence showing the market value of all of the real properties of the plantation before the takings and the market value of the same properties remaining after the takings.

SUMMARY OF ARGUMENT

1. Where a part of a tract of land (including the improvements thereon) is taken for public use, the just compensation to which the owner of an interest therein is entitled includes the damages to the remainder of the tract resulting from the taking, in addition to the value of the property taken. As a result of the takings in these proceedings, the physical properties of the Honolulu Plantation Company remaining after the takings were depreciated in value because of the severance of the real property taken from the properties operated as a unit by the Plantation. The difference between the market value of all of the real properties of the Company held before the takings and forming the integrated enterprise owned and conducted by the Company and the market value of the same property remaining after the takings is the amount the Company suffered in damages by reason of the severance.

ARGUMENT

I.

THE AWARD IS FOR DAMAGES TO THE REMAINING PROPERTIES OF THE PLANTATION.

It is well settled in the law of eminent domain that where land is taken by the sovereign the owner is entitled to be compensated not only for the value of the land taken but also for the loss in the value of the remainder of the tract. In the absence of a market price, the amount of compensation to which the owner is entitled is to be determined by taking the fair value of the whole plant at the date of the taking and also the fair value of the plant after the taking. The difference in these values represents the amount of compensation to be paid. *Stephenson Brick Co. v. U. S.*, 110 F. 2d 360, 1940; *Baetjer v. U. S.*, 143 F. 2d 391, 396, 1944; certiorari denied 323 U.S. 722; *Porrata v. U. S.*, 158 F. 2d 788, 789, 790, 1947.

The Government in its opening brief concedes the validity of this general rule but contends, however, that this well accepted principle has no application to the facts of the present case because the Honolulu Plantation Company by virtue of certain condemnation clauses in the leases had relinquished to the fee owners its interest in the value of the condemned land. It is said that the difference between the value of the whole before the taking and the value of the remainder thereafter which the Company claimed as severance damages actually represents the relinquished interest in the condemned land and not a diminution in the value of the remainder.

We shall attempt to demonstrate to the Court that the theory upon which the Government relies is founded upon a faulty premise and upon the assumption of certain facts which are not disclosed in the record. We will show to the Court that even though no claim was made for compensation for the property condemned but only for damages to the remainder that the award of the trial court should be sustained on the basis of the evidence adduced upon the trial of these consolidated proceedings.

It is a matter of record, of which the Court may take judicial notice, that the original consolidated thirteen proceedings included as defendants, numerous parties in addition to the Honolulu Plantation Company. The claims of the other defendants, including the lessors of the parcels taken, are not at issue in this proceeding. We are concerned here only with the compensation to which the Honolulu Plantation Company as lessee of the land taken is lawfully entitled.

While the Government apparently concedes the validity of the general rule with reference to severance damages, it apparently takes the position that the Honolulu Plantation Company failed to prove such damages upon the trial of this cause in the District Court. More specifically, the argu-

ment seems to be that although the Company's witnesses stated clearly and unequivocally that the Company suffered damages to the plantation properties remaining after the taking, their testimony is to be interpreted to mean that the amount of such damages represented the interest in the condemned land which the Company relinquished to the fee owners and not a diminution in the value of the remainder of the plantation. The Government attempts to justify this theory in part upon the assumption that in a claim for relief submitted to Congress, the Honolulu Plantation Company's claim was based on damages to each acre taken in the amount of \$1,000 per acre. Apparently, the Government is attempting to rely on a statement of the Company purportedly made in a claim to Congress which has no relevancy to the issues in this case. More important, it refers to a Government exhibit introduced in the lower court which the Government did not see fit to designate as a part of the printed record on appeal.

The Government's position may be summarized in the following excerpt from the Government's brief. (Page 10)

"... The company had invested in leased cane land at the rate of about \$1,000 an acre. It had relinquished to the lessors its right in case of condemnation of such land to share in the compensation. As a result of this relinquishment it had lost what it invested. In short, the company had lost the money it had invested in the condemned lands. But since this loss resulted from the company's agreements with its lessors and not from the Government's condemnation of the land, the company had no claim against the Government...."

In view of these general considerations, we turn now to the evidence of damages introduced by the Honolulu Plantation Company at the trial below.

The testimony of Mr. George L. Schmutz (R. p. 669 et seq.) may be considered first. Mr. Schmutz valued all of

the properties of the Honolulu Plantation Company prior to the takings, excluding movable personal property and excluding growing crops at \$4,200,000 (R. p. 686) and he valued the same property with the same exclusions after the takings involved in these proceedings as of June 21, 1944, at \$3,113,000 (R. p. 687).

The following testimony of Mr. Schmutz appears at page 688 in the record.

“Q. Would you explain how you arrived at that figure of a thousand dollars an acre?

A. I took into consideration several matters. One of them was the evidence that I found in discussing the matter with people as regards to the common notion in the community regarding the investment in irrigated cane lands per acre, which was a thousand dollars an acre for plantations which did not have a refinery, whereas this particular property does. I also made a study indicating the amount of depreciation in the value of the property from 1939 on up until the present time, for the purpose of getting an over-all picture on shrinkage in the value occasioned by the taking of considerably more acres than are involved in this action, *for the purpose of arriving at an indication of the amount of depreciation on the average which was suffered by reason of the loss of each acre, on the average.* I also had occasion to make a study of a report prepared by a technician in this city of the damage caused by 580 acres of land taken in this particular plantation in some prior actions for the purpose of getting his views, his method of approach, and his conclusions. *And as a consequence of these studies and investigations and computations, I came to the conclusion that the average value is about a thousand dollars per acre; for each acre that was lost, shrunk the value of the property, the physical property, at the rate of about a thousand dollars per acre.*” (Italics supplied.)

At page 689 in the record:

“Q. As of the date of these takings the cane produced on the plantation would permit, that is, before the takings, as of the date but before the takings, permit what output of the mill?

A. As I recall, it was approximately 20,000 tons.

Q. And after the takings?

A. Approximately 15,000 tons.

Q. Would the fact as shown by such testimony and as shown by such evidence have anything to do with the value of the mill? If so, what?

A. In my opinion it would tend to depreciate the value of the mill because of the resulting over-capacity, and because of the further fact that there would be an increase in production costs, all of which would tend to put the mill in the position of being unable to earn a fair return upon its reasonable value.”

At page 746 in the record:

“Q. So that the only thing that was affected was a lowering in your opinion of the value because of this over-capacity, is that right, with the cane lands available?

A. Over-capacity, plus the further fact that because of its oversize it could not be used as efficiently as a mill which was properly designed for the new capacity.”

And at page 782 in the record:

“A. What I’m trying to say is that I made an estimate of what the value of this property was as I saw it on one date and then made another estimate of the value of the property as I saw it on another date, irrespective of all of these conditions which you speak of, irrespective of those I came to the conclusion that there was a certain shrinkage in the value which appeared to be approximately a thousand dollars an acre.

Mr. Stafford L. Austin, testifying as an officer of the Honolulu Plantation Company, gave as his opinion of value

before the taking the amount of \$4,300,000 and after the taking gave as his opinion of value the amount of \$3,300,000, or a difference of \$1,000,000. At page 606 in the record appears the following testimony of Stafford L. Austin:

“Q. You are using a thousand dollars an acre on each one of those, aren’t you?

A. Correct.

Q. Why do you do that?

A. Well, it’s been the, more or less the rule of thumb from the standpoint of the plantations in my experience in the plantations in talking with others, from the standpoint of the Honolulu Plantation Company, with the refinery and such, that a thousand dollars an acre was an equitable figure to use for that purpose.

Q. That’s according to the books of the Honolulu Plantation Company and their method of bookkeeping, is that what you mean?

A. No.

Q. What do you mean, then?

A. I mean from the standpoint of taking values and from talking to others, and the amount of capital required for a plantation the size of Honolulu Plantation Company, for putting in all the various equipment necessary to run a plantation that it would come to about that figure.

Q. Well, is that valuation of the plant? Are you getting a capital value to it now in that answer?

A. A capital value.

Q. Capital assets?

A. The initial investment, such as for ditches and pipe lines and mill and all the equipment necessary to run a plantation. . . .”

At page 571 in the record:

“Q. What, if any, effect did that have on the value of the mill?

A. Well, we could have — it reduced the mill value to one, to a mill the size of one that would take 15,000

tons of sugar. If you've got a 15,000-ton sugar mill that size, it would have been ample to take care of the crop."

At page 576 in the record:

"Q. Can you state, Mr. Austin, whether or not in peace times, normal times, it would be possible to successfully operate a plantation where it is a 15,000-ton plantation at Aiea?

A. At the location and with the lands left available, it would be — and the very heavy equipment that they have there for a larger output, it wouldn't be successful, and sooner or later the plantation would have had to be sold."

At page 609 in the record:

"Q. Likewise, these five other takings after Hickam Field, amounting to in the neighborhood of 700 acres, did those reduce the capital investment?

A. It shrunk the value of the plantation by that much.

Q. Affected capital investment that way, did it?

A. It wouldn't affect the capital investment,—

Q. Yes?

A. —but it would shrink the value of the whole plant, as a whole."

And at page 618 in the record:

"A. Well, the fact is this, if you have a great big piece of equipment and you built the whole plantation with the idea of operating in a certain manner, with a certain tonnage, when you don't get that tonnage by reason of a cutdown in the area, then the whole, your whole equipment decreases, there's a shrinkage in value of the equipment because you can't do what you put it up to do."

Mr. Charles Campbell Crozier, deputy tax commissioner of the Territory, who testified as an expert witness for the Company, valued the plantation prior to the taking as

\$4,000,000 and after the taking at \$3,000,000, making a difference of apparently \$1,000,000.

A portion of Mr. Crozier's testimony (R. p. 873) is as follows:

"Q. What is this thousand per acre rule that you mentioned?

A. Well, it's one of the methods that can be developed as the rate per acre for a leasehold plantation insofar as the value of money in an enterprise, in its capital as a leasehold plantation, to operate and produce sugar. And that will vary with the size and many factors in it. But I should imagine that the 30, the 25,000 ton plantation, as a leasehold, would require for a thousand dollars per acre of capital to carry on its enterprise, starting with the virgin land and taking the land and weeding it, fencing it, and the ditches and everything else that goes with the enterprise. So that if you use that rule, that would represent a thousand acres at a thousand dollars and would be a million dollars diminishing."

It is clear from the evidence adduced at the trial that the \$1,000-an-acre figure represented only the average overall investment per acre. It does not mean, as the Government seems to imply, that the Company's witnesses put an actual value of \$1,000 on each and every acre of cane land. As a matter of fact, the testimony of the Company's witnesses indicates that while their opinions were based on a value of \$1,000 per acre for each acre of cane land controlled by the plantation, they clearly did not value each acre at \$1,000.

This is made even more apparent by the excerpt quoted by the Government (p. 9) from the report of the House Committee on Claims (R. p. 1550) :

"It showed that . . . plantations had an average investment of \$1,023 per acre of arable sugar cane-producing lands, and that actual investment in capital of this claimant in 1939 before any expropriations of

leased lands had occurred was \$983 for every acre in production. After the takings the exhibit showed that the investment for the same purpose rose to \$1,512 per acre."

It is to be noted that the report speaks of an *average investment* of \$1,023 per acre, and of an *actual* investment in capital in 1939 of \$983 for every acre in production. Moreover, the statement is made that after the takings, the investment "rose to \$1,512." Obviously, if as the Government contends there were an actual investment of \$1,000 per acre in each acre of cane land, the takings referred to in the claim would have reduced the investment in exact proportion to the land taken. To show the inconsistency of the Government's position, we refer briefly to the following statement also made in the House Committee report (R. p. 1549):

"The evidence before this committee is that in excess of \$5,000,000 were invested in this claimant's enterprise, all of which was indispensable to the raising and marketing of sugar cane. That this sum was largely invested in a mill, water and pumping system, and sundry other requirements such as housing for workers, hospital, and the like. *All of these were located on fee-owned lands of the claimant which were not devoted to raising sugar cane. . . .*" (Italics supplied)

It is believed that this excerpt from the very Committee Report upon which the Government relies in its argument reveals the untenability of the Government's theory. It is obvious that the mill, irrigation system, housing, and the like largely comprised the investment of the Company. For purposes of analysis and comparison, the Company in preparing the claim to Congress deemed it advisable to indicate the *average* investment per acre. This figure was obtained by dividing the capital investment (which investment was largely in the mill, irrigation system, housing,

and the like) by the number of acres of cane land controlled by the plantation. The result was the amount of \$1,023 per acre. After the takings, when the same capital investment was divided by the reduced acreage, the average investment per acre rose to the equivalent of \$1,512 per acre.

Actually, the contention made by the Government is an additional persuasive argument in favor of the plantation's position for it shows that the average investment in the plantation property, including the mill, camp housing, railroads, the irrigation system and the like, of approximately \$1,000 per acre was required to operate the plantation prior to the takings and that as a result of the takings, *the investment in the plantation properties remained the same*, but since that amount was allocable to a reduced acreage, the average investment per acre was raised to \$1,512 per acre.

The basic fallacy in the Government's argument is apparent when reference is made to other testimony of the Company's witnesses referred to above which shows conclusively that after the takings involved in these proceedings the Company's mill, irrigation system, railroad and other non-movable physical properties had an uneconomic over-capacity so that they could not be operated by the Company or anyone else as efficiently and as profitably as before the taking. The opinions of the Company's witnesses as to the value of the plantation's properties before and after the takings indicate that *the value of the property remaining after the taking* decreased in value at the rate of \$1,000 an acre for each acre of cane land taken.

It is submitted to the Court that the Government is suggesting a construction of the so-called "thousand dollar an acre rule" which is wholly unwarranted by the evidence. As has been indicated above, neither the claim to Congress, nor the testimony of the Company's witnesses supports such an interpretation.

1. THE CONDEMNATION CLAUSES CONTAINED IN THE COMPANY'S LEASES DO NOT PRECLUDE A RECOVERY FOR SEVERANCE DAMAGES.

The Government in its answering brief makes the statement that by certain condemnation clauses contained in the leases, the Company relinquished to the fee owners its interest in the value of the condemned land. The Government seems to imply that such clauses operate as a termination of the lease and preclude any recovery by the lessee in the event of condemnation. In order to refute this argument, it is proposed to examine in some detail the condemnation clause which was contained in virtually the same form in all of the major leases of the Honolulu Plantation Company involved in this proceeding.

In Plantation's Exhibits 9-G (R. 1443), 9-H (R. 1374), 9-I (R. 1468) and 9-J (R. 1500), the following condemnation clause appears in substantially the following form:

“(2) That in the event the demised premises or any part thereof shall be required, taken or condemned for any public use, then in every such case the estate and interest of the Lessee in the part of the premises taken shall at once cease and determine, and the Lessee shall not, by reason of such taking, be entitled to any claim either against the Lessors or others for compensation or indemnity for the taking of any land or water, or any buildings or other improvements as shall have been made prior to Jan. 1, 1936, and all compensation payable to or to be paid by reason thereof, shall be payable to and be the sole property of the Lessors, and the Lessee shall have no interest in or claim to such compensation or any part thereof whatsoever, provided, however, and it is hereby agreed that such compensation as shall represent the value of any growing crops shall be payable to and be the sole property of the Lessee; and such compensation as shall represent the value of any buildings or other improvements, made or constructed after Jan. 1, 1936, shall be divided

between the Lessors and the Lessee as their interests shall appear, dependent upon the then unexpired term of the lease; and it is further agreed that if such taking shall so affect the remaining premises held by the Lessee under this lease or so affect the operation of the Lessee's remaining lands and tenancies, or the business being conducted thereon as to cause substantial damage to the Lessee, then and in that event the Lessee shall have the right to present and pursue its claim for damages and be compensated therefor so long as such action or the payment of such damages shall not affect nor diminish the compensation payable to the Lessors as stipulated hereinabove. . . ."

This clause, it will be observed, provides that in the event of condemnation the estate and interest of the lessee shall cease and determine, but there is a further specific provision which provides as follows:

"... and it is further agreed that if such taking shall so affect the remaining premises held by the Lessee under this lease or so affect the operation of the Lessee's remaining lands and tenancies, or the business being conducted thereon as to cause substantial damage to the Lessee, *then and in that event the Lessee shall have the right to present and pursue its claim for damages and be compensated therefor so long as such action or the payment of such damages shall not affect nor diminish the compensation payable to the Lessors as stipulated hereinabove. . . .*" (Italics supplied)

A somewhat similar condemnation clause was construed in the case of *United States v. 8286 Sq. Ft. of Space, etc.*, 61 F. Supp. 737, 738. In that case the pertinent qualifying provision read as follows:

"... but nothing herein contained shall deprive Tenant of the right, if any, to receive from the requisitioning or condemning authority award for compensation or loss of or damage *to any of Tenant's tangible property or business*, provided the same is not in diminu-

tion of the award or compensation payable to Landlord; . . ." (Italics supplied)

In that case, the court expressly recognized that if the lessee were able to prove damages, he would not be precluded from such recovery by virtue of the condemnation clause.

In that case (p. 742) the Court remarked as follows:

" . . . Reading the clause as a whole it is entirely clear that four things are definitely provided in the event of condemnation. They are (1) the lease expires; (2) the rights of the parties *inter sese* for the future thereupon terminate; (3) the tenant is not to be entitled to any apportionment of the award to be made by reason of the condemnation except that (4) *if the condemning authority damages the tenant's tangible property or business the latter shall not be deprived of the right, if any, to receive compensation for such loss or damage, provided the same is not in diminution of the award or compensation payable to the landlord.* (Italics supplied)

"True it is that *if* the tenant has a legal right to recover against the condemning authority for loss or damage to his tangible property or business (in which of course the landlord is not interested) then the tenant is not deprived of that right by the condemning clause. But this proviso is not applicable under the facts of this case. . . ."

In view of this additional proviso in the condemnation clause, it is submitted that the operative effect of the clause in question is such, insofar as the rights of the lessee are concerned, that if the lessee possesses a legal right to recover against the Government as a condemning authority for damages to the remaining premises held by the lessee under any of these leases or if the taking so affects the operation of the lessee's remaining lands and tenancy as to cause substantial damage to the lessee, then the lessee is not de-

prived of such a right under the condemnation clause. The damages claimed by the Company in these proceedings are measured by the depreciation in the value of the properties of its sugar growing and processing enterprise remaining after the taking and which were due to the taking. It is the contention of the Appellee that after the takings the plantation's mill, irrigation system and the plantation's property in general had an uneconomic over-capacity with respect to the cane lands to supply the enterprise, such that the plantation could not be operated by any one as efficiently as before the takings and that such over-capacity depreciated the value of the mill, the irrigation system and the other equipment and properties remaining after the takings.

It is the position of the Appellee that the qualifying provision of the condemnation clause does not affect the legal right of the lessee to recover for such damages, but on the contrary specifically recognizes that right in favor of the lessee. The Appellee concedes that it has no claim in this proceeding for compensation for the property condemned and physically taken because of the operation of the condemnation clauses referred to above. However, the Appellee contends that the qualifying provision of the condemnation clauses expressly permits the lessee to prove any severance damages it suffered by reason of the takings. As we shall hereinafter point out to the Court, the Company properly proved damages to its remaining lands on the trial of this cause. The trial court found that "the Company had proven its claim that its remaining property decreased in value at the rate of \$1,000 an acre for each cane acre taken," (R. p. 491) and awarded damages upon the basis of \$1,000 per acre for 440.175 acres, or a total of \$440,175.00.

2. THE APPELLATE COURT WILL NOT CONSIDER A THEORY OF A LITIGANT BASED IN PART UPON AN EXHIBIT NOT INCLUDED IN THE RECORD ON APPEAL.

The Appellee wishes to point out a technical objection in connection with the reference by the Government to the claim which was submitted to Congress by the Honolulu Plantation Company. This claim was introduced in evidence by the Government and was admitted in evidence by the Court as Government Exhibit O but the Government failed to designate this exhibit as a part of the record on appeal.

It seems highly improper for a litigant in advancing a legal proposition on appeal to rely on an exhibit which is not a part of the record. The fact that the record does contain certain references to the Congressional claim, which are referred to in the Government's brief, should not affect the general rule that the Court will not consider any evidence dehors the record. *American Trust Co. v. Harris*, 88 F. 2d 541, 1937.

On appeal, the record alone controls with respect to the facts, and facts stated in the brief and not shown by the record may not be given effect. *Bono v. U. S.*, 113 F. 2d 724, 1940.

Accordingly, it is the position of the Honolulu Plantation Company that the Court should refuse to consider the argument of the Government to the effect that the award is for the land taken insofar as that argument is dependent upon any statements made in the Congressional claim.

II.

THE HONOLULU PLANTATION COMPANY IS LEGALLY ENTITLED TO THE AWARD OF \$440,175 AS JUST COMPENSATION FOR SEVERANCE DAMAGES SUFFERED BY THE SAID COMPANY FOR THE TAKING OF ITS PROPERTY INTEREST IN 440.175 ACRES OF LAND.

For the convenience of the Court and for the purpose of preserving the continuity of Appellee's argument, it is believed desirable to repeat pages 24 to 36, inclusive, of cross-appellant's opening brief.

One of the principal issues before the District Court and the only issue involved in the present appeal and cross-appeal is whether or not the Honolulu Plantation Company is entitled to severance damages because of the taking of certain of the lands in these proceedings. No evidence was introduced by the Government relative to severance damages, the latter taking the position that the Honolulu Plantation Company was not entitled to severance damages as a matter of law. Accordingly, under well established rules of law, the Appellate Court must regard the findings of the trial court with relation to severance damages if adequately supported by the evidence, as conclusive and binding.

In order to assist the Court to the fullest extent in resolving the question of severance damages, it is believed advisable to first present the law applicable to that phase of the case and then to discuss the evidence. The law clearly allows the severance damages in question if they are proved, and the evidence adduced clearly shows that the Company was damaged.

It is clear that the property taken was mainly leasehold property and to a great extent the property remaining was leasehold property, though it should be pointed out that the sugar mill and the major part of the irrigation system and camps for employees which were located on fee lands owned by the Company suffered the greatest severance

damages. The fact that the property taken was leasehold rather than fee has, of course, no bearing on the rights of the Honolulu Plantation Company insofar as severance damages are concerned.

“The critical terms are ‘property,’ ‘taken’ and ‘just compensation.’ It is conceivable that the first was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. On the other hand, it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen’s relation to the physical thing, as the right to possess, use and dispose of it. In point of fact, the construction given the phrase has been the latter. When the sovereign exercises the power of eminent domain it substitutes itself in relation to the physical thing in question in place of him who formerly bore the relation to that thing, which we denominate ownership. In other words, it deals with what lawyers term the individual’s ‘interest’ in the thing in question. That interest may comprise the group of rights for which the shorthand term is ‘a fee simple’ or it may be the interest known as an ‘estate or tenancy for years,’ as in the present instance. The constitutional provision is addressed to every sort of interest the citizen may possess.”¹

The above excerpt from the General Motors case indicates that the Court is here concerned with the plantation’s “relation to the physical thing, as the right to possess, use and dispose of it,” that is, the plantation’s interest “in the thing itself” and that is the “interest known as an ‘estate or tenancy for years.’”

The basic rule with respect to severance damages is well stated by the Circuit Court of Appeals, Third Circuit, in the Sharpe case² in the following language:

¹ United States v. General Motors Corporation, 323 U.S. 373, 89 L. Ed. 311 (1945).

² Sharpe v. United States, 112 F. 893, 896 (1902).

"... It is not denied that in rendering the 'just compensation' secured by the constitution of the United States to the citizen whose property is taken for public uses it is right and proper to include the damages in the shape of deterioration in value which will result to the residue of the tract from the occupation of the part so taken. In applying this rule, however, regard is had to the integrity of the tract as a unitary holding by the owner. The holding from which a part is taken for public uses must be of such a character as that its integrity as an individual tract shall have been destroyed by the taking. Depreciation in the value of the residue of such a tract may properly be considered as allowable damages in adjusting the compensation to be given to the owner for the land taken. It is often difficult, when part of a tract is taken, to determine what is a distinct and independent tract; but the character of the holding, and the distinction between a residue of a tract whose integrity is destroyed by the taking and what are merely other parcels or holdings of the same owner, must be kept in mind in the practical application of the requirement to render just compensation for property taken for public uses. How it is applied must largely depend upon the facts of the particular case and the sound discretion of the court."

The evidence, as we shall hereafter point out to the Court, clearly shows that the properties remaining after the takings (excluding movable personal property) suffered a loss in value by reason of the takings. If so, how may such loss of value be proven?

"... 'Upon considering the record and the argument we find that the land taken is a part of a larger tract which at the time of the taking was used as a unit for a brick manufacturing plant and that the severance of the part taken did destroy the usefulness and value of the plant, so that what remained had the value only of disorganized land and buildings, and the machinery comprised in the plant had only the value of such second-hand property. The owner is entitled to be compensated not only for the separate value of the

land taken, but also for the loss in value of the remainder of the tract in the use that was made of it at the time of the taking.

'There being no established market price, the fair value at the date of the taking of the whole plant, excluding personal property, ought to be ascertained, looking upon it as a plant organized for a business shown to be generally successful and having a good prospect; and also the fair value for sale of what was left afterward. The difference in the values is the just compensation to be paid. That the plant was making money may be considered in fixing its value for sale, but the business is not to be valued as such, nor is any loss of future profits to be compensated. What the plant originally cost, what Stephenson Brick Company paid for it at judicial sale, it not having been a sheriff's sale, and what it would cost to reproduce the plant less a fair depreciation, may all be considered, but neither is to be taken as a fixed standard. The members of this court are not agreed on the value of all the items involved in the plant or in what is left of it, and we do not attempt to fix them separately. We do agree that the total compensation fixed by the three district judges is fair; and we find as our judgment of the value of the property condemned and as the just compensation due to be paid for the taking as of the date thereof, to-wit October 28, 1936, the sum of \$97,500.' (Italics supplied)

Stephenson Brick Co. v. U. S. et al.

CCA 5th Circuit

110 Fed. 2nd 360, 361.

Decided March 15, 1940.

In *Baetjer v. United States*, 143 F. 2d 391, the Court says:

"With these general considerations in mind we turn to the evidence on damages introduced by the appellants at the trial below, but stricken at the end of their evidence in chief. This evidence was to the effect that in the past the appellants had raised sugar cane on the lands on Vieques which the government has taken; that

they had transported this cane to their mills on the main island of Puerto Rico for processing into sugar; and that, there being no other lands economically available upon which they could raise cane to keep their mills running at full capacity, they had suffered a loss to the extent of \$270,000 'in value of excess equipment.' The meaning of the phrase just quoted is not altogether clear. *If it means that after the taking the appellants' mills had an uneconomic over-capacity so that they could not be operated by the appellants as efficiently and therefore as profitably as before the taking, then the stricken evidence shows only a loss to business which resulted as an unintended incident of the taking and so a loss not compensable under the doctrine of Mitchell v. United States, supra. On the other hand, if it means, and there is other evidence tending to show that this is what the witness who used the phrase meant by it, that the over-capacity of the mills with respect to cane lands available to supply them has depreciated their value on the market to the extent of \$270,000, then the evidence would tend to show a compensable loss. In short the stricken evidence would indicate a compensable loss only if it means that after the taking the appellants' mills had an uneconomic over-capacity so that they could not be operated by anyone as efficiently and therefore as profitable as before the taking, this being a matter which a hypothetical willing buyer would consider in determining what he would pay for the property. The case must be remanded for the court below to consider the appellants' evidence, and the evidence which the government says it can introduce to contradict it, in order to determine whether or not the appellants have suffered a compensable loss, and, if they have, its extent.*" (Italics supplied)

"It is well settled that, where part of a tract of land is taken for the public use, the just compensation to which the owner is entitled by the constitution includes the damages to the remainder of the tract re-

sulting from the taking as well as the value of the land taken. In other words, the 'just compensation' guaranteed by the constitution implies not merely the value of so much land separately from its connection with the whole tract, but the injury or loss to the whole estate caused by the taking from it the part which is so appropriated."

Nichols on Eminent Domain, Vol. 2
Second Ed. Par. 236, P. 721.

In the case of *Illinois Railway Company v. Humiston*, 208 Ill. 100 (69 N.E. 880), it appeared that a railroad condemned a strip of land for a right of way through a farm. There were buildings on a part of the farm, but the opinion indicates that the strip taken was vacant land. The lower court instructed the jury to value the strip "as a part of the whole farm" and excluded evidence offered by the taker concerning the value of the farm without improvements. The taker on appeal alleged that the exclusion of the evidence was error, on the ground that the value of the part was merely its value as "a part of the farm without improvements."

The upper court in affirming the lower court said:

"Where the vacant land embraced in the farm was necessarily used and occupied in conjunction with the improvements thereon, and, by reason of so being used and occupied, had a value as an entirety over and above the value of the bare land, the owner of the land would have the right to the value of the part, sought to be taken, as used and occupied in connection with the whole farm. In other words, the strip of land sought to be taken for a right of way has a special value to the owner in connection with the whole of the farm with the improvements upon it, which is greater than the mere value of the bare land without the improvements."

The case of *Lineburg v. Sandven* (N.D.) 21 N.W. 2d 808 is very much in point. This was an eminent domain proceeding arising out of the condemnation of lands for use as a public highway. The controversy here resulted from the taking of 21.88 acres of a farm containing 286.57 acres of land.

The District Court found the compensation to which the owner of the land was entitled was as follows:

Value of the 21.88 acres taken.....	\$ 590.76
Value of the fence.....	187.50
Damages to the remaining farm as a unit	2443.59
Total Compensation	<u>\$3221.85</u>

On appeal, the upper court sustained the findings made by the lower court except for the correction of an error made in the computation of the damages.

The principle stated by the lower court and accepted by the Supreme Court of North Dakota is well stated as follows:

“The compensation to which appellant is entitled is the difference between the actual market value of appellant’s property considered as a whole at the date of the trial before the severance of the property condemned and the actual market value of the remainder of the property after the appropriation of that part condemned.”

In answer to the contention of the appellant’s counsel that in arriving at the value of the farm before the taking, only the value of the land should have been considered and that no consideration should have been given to the buildings thereon, the Court said that this contention could not be sustained and quoted as follows from Lewis on eminent domain:

“Ordinarily buildings are part of the land and when land is taken for public use the buildings and structures thereon are taken with it and the whole must be paid for.”

The Court said further:

"The farm was established and had been maintained and operated as a single unit. The buildings are undeniably a part of the realty. The owner of the farm is entitled to be paid the value of the parcel of property which is taken and he is entitled to be paid the damages to the remainder of the farm that was not taken which result from the taking of the parcel and the construction thereon of the proposed highway. The parcel so remaining consists not only of the land but of the buildings thereon which are a part of the realty."

Certainly in valuing the property of any enterprise the question of whether or not the combined properties produce a fair return on the capital invested is important. In other words, properties of a successful going concern when considered as a whole are almost certain to have a greater value than the same properties of a concern which has been unsuccessful and must be liquidated.

A prospective purchaser considering the purchase of properties like those of the Honolulu Plantation Company would look into the history of the concern and the use made of its properties. He would consider whether the enterprise was successful or not as well as the future prospects of the enterprise.

As stated in the Stephenson Brick Company case, *supra*,

"There being no established market price, the fair value at the date of taking of the whole plant, excluding personal property, ought to be ascertained, looking upon it as a plant organized for a business *shown to be generally successful and having a good prospect*; and also the fair value for sale of what was left afterward." (*Italics supplied*)

(110 Fed. 2nd 360, 361)

The evidence adduced by the Honolulu Plantation Company, on the trial of these consolidated cases, shows beyond

any reasonable doubt that the Company sustained a compensable loss and is entitled to severance damages as a result of the takings.

It is the contention of cross-appellant herein that after the takings, the Plantation's mill, irrigation system and the plantation equipment in general had an uneconomic over-capacity with respect to the cane lands available to supply the enterprise, such that the Plantation could not be operated by anyone as efficiently as before the takings and that such over-capacity depreciated the value of the mill, the irrigation system and the other equipment and properties remaining after the takings. The market value of all of the real properties of the Company held before the takings and forming the integrated enterprise owned and conducted by said Company was far higher than the market value or the fair value of the real property of said integrated unit remaining after the takings. The difference between those values is the amount the Company suffered in damages by reason of the severance.

It is submitted that the testimony given by several witnesses shows that an uneconomic over-capacity would depreciate the value of the remaining plantation properties as a unitary whole.

The testimony in this regard given by Mr. George L. Schmutz (R. p. 669 et seq.) may be considered first. The outstanding qualifications of Mr. Schmutz, from the standpoint of both training and experience, as an engineer, real estate broker, appraiser and as author and lecturer on appraisal work, considered together with his intimate knowledge of the properties taken in these proceedings, suggest that his opinions of value are entitled to great weight.

Mr. Schmutz valued all of the properties of the Honolulu Plantation Company prior to the takings, excluding

movable personal properties and excluding growing crops, at \$4,200,000 (R. p. 686) and he valued the same properties with the same exclusions after the takings involved in these proceedings as of June 21, 1944, at \$3,113,000 (R. p. 687).

Mr. Schmutz said specifically that in his computations he did not ascribe any value to profits or good will of a going concern. Mr. Schmutz indicated that his opinion of value computed before and after the takings was based on a unit property value of \$1,000 per acre for irrigated cane land of a leasehold plantation (R. p. 687) and that he considered the total irrigated cane land area controlled by the Honolulu Plantation Company before the takings at 4,283 acres and that after the takings involved in these proceedings he considered the irrigated cane land controlled by the company at 3,196 acres (R. p. 687).

The witness testified that in arriving at a unit property value of \$1,000 per acre he considered several matters. Among other factors, he said that in discussing the matter of value with people in the community regarding the investment in irrigated cane lands per acre, he found that the common opinion in the community was that leasehold plantations without a refinery required the investment of about \$1,000 per acre in irrigated cane lands and the properties serving them (R. p. 688). The witness testified further that he had made a study showing the amount of depreciation and the value of the property from 1939 to the present for the purpose of determining the shrinkage in value occasioned by the taking of considerably more acres than are involved in the present proceedings to get some indication of the amount of depreciation on the average suffered by the loss of each acre (R. p. 688). Mr. Schmutz indicated also that he had made a study of a report prepared by a qualified technician in Honolulu concerning the damage caused by prior takings for the purpose of understanding his views, his method of approach and his conclusion. The

witness said that as a result of these studies and investigations, he arrived at a conclusion that the value of the physical property depreciated at the rate of about \$1,000 per acre for each acre that was lost by virtue of the takings (R. p. 688).

Mr. Schmutz testified further that on the basis of the published annual reports of the company, the output of the mill was approximately 20,000 tons prior to the takings and about 15,000 tons after the takings (R. p. 689). It was his opinion that the decrease in the output of the mill would depreciate the value of the mill property not only because of the resulting over-capacity but also because of the further fact there would be an increase in production cost so that the mill could not be operated as efficiently and, therefore, as profitably as before the taking (R. p. 689).

The witness indicated that in arriving at his opinion of value he considered the fact that there was no land available for replacement of cane growing areas lost to the Government in these proceedings. He said that if there had been land available for replacement, the damage would have been less (R. p. 690). He testified that he also considered the fact that in 1936 the Company renewed or extended most of its major leases to the year 1965 (R. p. 678).

It was further pointed out that if there had been a free market for raw sugar and if the same could be purchased in the market in the future to take the place of plantation grown cane, the damage would have been less (R. p. 691).

Mr. Charles Campbell Crozier, Deputy Tax Commissioner of the Territory, testified as an expert witness for the Company (R. p. 835 et seq.).

Mr. Crozier indicated that in his capacity as a tax official and as an appraiser for the Government in a number of its takings, he had studied the Honolulu Plantation Company to a considerable extent (R. p. 852).

Mr. Crozier was asked to assume that on June 21, 1944, the Honolulu Plantation Company had approximately 4400 acres of cane land and that on that date 1,087.590 acres of cane land were taken from it, and to express his opinion as to the fair value of all of the properties of the plantation before and after the takings, excluding movable personalty and growing crops, taking into consideration his knowledge of the plantation, its holdings and the manner in which it was held (R. p. 870). The witness said that in his opinion there would be a diminishing value before and after the takings of approximately 20% or about a million dollars (R. p. 871).

The witness based his opinion of value on the theory that a plantation of 4400 acres was an enterprise of certain characteristics and that as the lands comprising the 1,087 acres were taken, there was a diminishing value. The witness said that as of June 21, 1944, a plantation of 4400 acres would possess a certain value, which the witness set at about \$4,000,000. He testified that as of June 22, the day after the takings, by use of the so-called "thousand-dollars-an-acre rule," the value of the plantation would be about \$3,000,000 (R. p. 873).

Witness explained the "thousand-dollars-an-acre rule" as one of the methods developed to estimate the capital or investment required for a 25 or 30 thousand ton leasehold plantation to operate and produce sugar (R. p. 873).

The testimony of Mr. S. L. Austin (R. p. 526 et seq.) and Mr. Spalding (R. p. 1040 et seq.), testifying as officers of the Honolulu Plantation Company, substantiates to a very large degree the testimony given by Mr. Schmutz and Mr. Crozier.

Mr. S. L. Austin's opinion of the value of the plantation, excluding movable personalty and growing crops before the takings involved in these proceedings, was \$4,300,000 and

his opinion of the value of the plantation excluding the same items after the takings was \$3,300,000 (R. p. 582, 583).

Mr. Schmutz, Mr. S. L. Austin and Mr. Crozier all testified that prior to the takings, the output of the mill was in excess of 20,000 tons and that the output of the mill after the takings was and could only be about 15,000 tons. All three witnesses expressed the opinion that the decrease in the output of the mill would depreciate the value of the mill property because of the resulting uneconomic over-capacity.

All three of the witnesses testified that in arriving at their opinions on value they considered the fact that there was no suitable land available for the replacement of cane growing area lost to the Government. All three of the witnesses testified that in their judgment the value of the remaining physical property depreciated at the rate of about \$1,000 per acre for each acre of cane land which was lost as a result of the takings. All three of the witnesses testified that they did not ascribe any value to potential profits or the good will of a going concern.

It is respectfully submitted that the factors considered by the Company's witnesses were properly considered and that the testimony shows conclusively that after the takings involved in these proceedings the Company's mill, irrigation system and other nonmovable physical properties had an uneconomic over-capacity so that they could not be operated by the Company or by anyone else as efficiently and as profitably as before the taking.

Witnesses for the Company considered and they had a right to consider that the plantation was organized to conduct a business which had been generally successful and which possessed a good prospect. The factors considered by the witnesses in arriving at the value of the plantation before and after the takings, such as the dividends record of

the Company, the renewal or extension in 1936 of most of its major leases, the amount of money spent by the Company in capital improvements and betterments, the book value of the Company, the earnings of the property during the years prior to the takings were proper elements to be considered. It is admitted that the witnesses for the Company did not attempt to fix separately the value of all or any of the items considered in arriving at their opinions. However, they did reach substantial agreement on the difference in value of the plantation before and after the takings. Mr. Schmutz' opinion of the value before the taking was \$4,400,000 and his opinion of value after the taking was \$3,113,000 or a difference of \$1,287,000 (R. p. 686, 687). Mr. Austin's opinion of value before the taking was \$4,300,000 and his opinion of value after the taking was \$3,300,000 or a difference of \$1,000,000 (R. p. 582, 583). Mr. Crozier's opinions were substantially the same as Mr. Austin's.

The opinions of the Company's witnesses as to the value of the plantation's properties before and after the takings indicate that the value of the property remaining after the takings decreased in value at the rate of \$1,000 an acre for each acre of cane land taken.

The attention of the Court is directed to a letter dated July 20, 1945, from James Forrestal, The Secretary of the Navy, relative to the claim which the Company had submitted to Congress (R. p. 1556). We quote as follows from that communication:

"The case of *Baetjer v. The United States* (143 F. (2d) 391) involved practically the same circumstances as are presented here, except that in the *Baetjer* case, the lands acquired by the Government were owned in fee, whereas in the present case they were occupied under long-term leases. *Baetjer* was trustee for Eastern Sugar Associates which owned approximately 30,000 acres of cane lands, roughly two-thirds of which, to-

gether with the company's mills, were located on the island of Puerto Rico. The remaining 10,000 acres, more or less, were situated on Vieques Island, 10 to 17 miles distant. Most of these lands on Vieques Island were condemned by the United States for naval uses. The district court discarded evidence introduced for the purpose of showing that the capital value of the company's holdings on the island of Puerto Rico had depreciated as a result of the takings of its lands on Vieques. The circuit court of appeals (first circuit) held that the evidence was admissible for the purpose of showing that the over-capacity of the mills with respect to cane lands available to supply them had depreciated in value. 'In short,' the court said, 'the stricken evidence would indicate a compensable loss only if it means that after the taking the appellants' mills had an uneconomic over-capacity so that they could not be operated by anyone as efficiently and therefore as profitably as before the taking, this being a matter which a hypothetical willing buyer would consider in determining what he would pay for the property.'

"The Navy Department is not informed of any 'decided case' that has ever held that a different principle than that followed in the Baetjer case should be applied in a situation where the lands taken were occupied under long-term leases under circumstances such as we have here, nor does it understand that the Attorney General of the United States has ever had occasion to sanction such a distinction."

It is submitted to the Court that the above quotation expresses the views of the agency of the Government which initiated the takings in these proceedings. While it is, of course, merely the opinion of the Navy Department, it is worthy of note because it shows that the Navy believes that the principle of the Baetjer case is applicable to the facts of the present case.

There is no doubt but that the remaining properties of the Honolulu Plantation Company were severely damaged

by reason of these takings. It was given a death sentence. It was left with properties that had great value to a going concern but had less value when large portions of the Company's lands were taken. It is not a fictitious loss, it is not a hypothetical loss, nor is it an unascertainable loss. It is a direct and measurable loss and a loss due to the action of the Government. No compensation has been paid to the Appellee or anyone else in connection with the severance damages to Appellee's properties. It is submitted to the Court that the Constitution of the United States protects property owners against such a loss. The Appellee is entitled in this case to recover damages in the amount of that loss.

In its decision, the trial court found that the Company had proven its claim that its remaining properties decreased in value at the rate of \$1,000 an acre for each cane acre taken (R. p. 491). Accordingly, the trial court awarded damages upon the basis of \$1,000 per acre for 440.175 acres, or a total of \$440,175.

III.

THE FINDINGS OF THE TRIAL COURT ARE NOT CLEARLY ERRONEOUS WITHIN THE MEANING OF SECTION 52(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE AND SHOULD NOT BE DISTURBED ON APPEAL.

Appellate courts are constituted primarily for the purpose of adjudicating questions of law. Such courts ordinarily will not decide questions of fact on the basis of the printed record because no opportunity is afforded the court to judge the credibility of the witnesses. Accordingly, the question of the credibility of the witnesses and the weight to be given their testimony is exclusively within the province of the trial court, the appellate court being called upon to determine whether there is any evidence from which the trial court may properly draw its conclusions.

It is a well settled rule that the value of real property or damages to real property may be proved by the estimate, conclusion or opinion of competent witnesses. The unusual or speculative character of the property does not preclude testimony by competent witnesses as to value or changes in value.

The relative weight and sufficiency of expert and opinion testimony is peculiarly within the province of the trial court in non-jury cases. Under such circumstances, the court will ordinarily consider the background, character and ability of the witness, his demeanor upon the witness stand, the soundness of his reasoning, possible bias in favor of the party for whom he testifies, the fact that he may be a paid witness and any other factors which may serve to affect his opinions of value. However, the court is not obligated to accept the testimony of an expert witness instead of its own judgment simply because the expert has special knowledge concerning the matters upon which he testifies.

This latter rule is well illustrated in the case of *Burnett v. Central Nebraska Public Power and Irr. Dist.*, 125 F. 2d 836, 837, 1942, in which the court remarked:

“Testimony as to the market value of land cannot soundly be regarded as anything more than an expression of opinion. *Byers v. Federal Land Co.*, 8 Cir., 3 F. 2d 9, 11. Of this fact, the range of values testified to by the experts in this case, from \$40,178.36 to \$119,430.76, is a complete demonstration. In such a common field, a jury cannot be required to substitute the opinion of expert witnesses for its own practical judgment on all the evidence even in cases where the estimate of the experts may not have been specifically contradicted. . . . While the jury is not at liberty, of course, arbitrarily to ignore such testimony, any more than it may ignore any other competent evidence, it has the absolute right to appraise it and to determine what weight shall be given to it or any part of it, in the light of all the general facts and circumstances developed on the trial, and of its own common knowledge and or-

dinary experience. . . . If it has been permitted to inspect the property, it is entitled, under the law of Nebraska, to treat such an inspection as part of the evidence of the case, and to make it an appropriate factor in its decision. . . ."

In the case of *Samuelson v. Central Nebraska Public Power & Irr. Dist.*, 125 F. 2d 838, 840, 1942, the court remarked as follows:

"As we have indicated in the *Burnett* case, *supra*, a jury is never required, in an ordinary condemnation proceeding, to accept as conclusive the estimates of value made by expert witnesses on either side. There ordinarily is in such cases some general testimony as to the location, character, use, etc., of the property, and other pertinent facts usually also are developed on direct or cross examination of the witnesses. All of this the jury is entitled to consider, together with any reasonable inferences which may be made therefrom, and it may properly exercise its own deliberate judgment on the amount of the damages, from the evidence as a whole, in the light of its common knowledge and ordinary experience, giving to the estimates of the expert witnesses only such weight as it conscientiously feels they are entitled to receive under all the circumstances. . . ."

Even where several competent witnesses concur in their opinions and no evidence is offered in contradiction, the court in a non-jury trial is bound to decide the issue in its own judgment. *The Conqueror*, 166 U.S. 110, 41 L. ed. 937, 1896.

The attention of the Court is directed to the case of *United States v. 2,049.85 Acres of Land*, 49 F. Supp. 20, 23, 1943, in which the court said:

"... While a jury 'has no right arbitrarily to ignore or discredit the testimony of unimpeached witnesses, so far as they testify to facts, and that a willful disregard of such testimony will be ground for a new trial,

no such obligation attaches to witnesses who testify merely to their opinion; and the jury may deal with it as they please, giving it credence or not as their own experience or general knowledge of the subject may dictate. * * * The jury, even if such testimony be uncontradicted, may exercise their independent judgment.' The Conqueror, 166 U.S. 110, 111, 131-133, 17 S. Ct. 510, 518, 41 L. Ed. 937. See, also, *Head v. Hargrave*, 105 U.S. 45, 50, 51, 26 L. Ed. 1028.

"The testimony of the witness Spice, a well-qualified geologist of wide experience called in this case as an expert witness by the government, was clear and definite upon the facts relating to the probability of the production of oil in paying quantities from the lands in question and was doubtless given great weight by the jury. The jury had that exclusive right and their findings on such question should not be disturbed."

In the instant case, the trial court found that the Honolulu Plantation Company had suffered damages to its remaining property at the rate of \$1,000 per acre for each acre of cane land taken. In its decision (R. p. 490, 491), the trial court remarked as follows:

"Very definitely the witnesses here meant what the First Circuit Court considered in that case a witness might have meant by 'in value of excess equipment.' Here all the evidence and the only evidence, as given by two expert appraisers and two men experienced in plantation affairs, is that the over-capacity of the mill due to the limited acreage available to supply it not only made the Company economically unprofitable but those same facts depreciated the market value of the remaining property, for a buyer being able to do no better than the Company could in this situation would pay less, at the rate of \$1,000 an acre for each cane acre taken, for what was left of the plantation's physical property and its permanent improvements.

* * * * *

"The ascertainment of the fair market value, or here in the absence of a market for sugar plantations, of

'fair value' in a condemnation proceeding is a very practical matter. While it is true that after these takings what was left was in just as good a condition, generally, as it had been the day before, it does not necessarily follow that it therefore is just as valuable. It is plain common sense that a buyer would pay for property what it is worth to him—buy at a figure at which he could reasonably foresee making a profit upon his investment. Considered in this practical light, I am satisfied by the evidence that the Company has proven its claim that its remaining property decreased in value at the rate of \$1,000 an acre for each cane acre taken.

"Because in its representations to Congress the Company made a mistake of law in interpreting its facts, I do not believe that its right to recover upon the strength of the Baetjer case should be barred. It still remains true that by the takings it suffered a capital loss, but as that, in turn, directly affected the value of the remaining property, severance damage occurred and may be recovered here."

In view of the general considerations indicated above, the trial court found that the Honolulu Plantation Company was entitled to severance damages upon the basis of \$1,000 per acre for 440.175 acres, or a total of \$440,175.00.

The rule is well established that the findings of the trial court in equity will not be reversed unless "clearly erroneous." This rule was written into the Federal Rules of Civil Procedure as Rule 52(a) applicable to all non-jury trials. Rule 52(a) provides in part as follows:

"... Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . ."

It has been held that Rule 52(a) is a rule of appellate procedure applicable to eminent domain cases. *United States v. Lambert*, 146 F. 2d 469, 471, 1944.

In the Lambert case, *supra*, the court remarked:

“Coming next to the amount of the awards, we must affirm the findings unless they are ‘clearly erroneous.’ The Rules of Civil Procedure apply to appeals in condemnation proceedings Rule 81(a) (7) and Rule 52(a), so far as it fixes the conclusiveness of findings, is a rule of appellate procedure. Moreover, the valuation of real property is an issue particularly for the trial court, for, when all is said, any conclusion can never be more than speculation. Each piece of land is *sui generis*; there are no others like it, and without others there can be no true market, as there is for fungibles. Sales of similar parcels will certainly help; we can use them as checks or limits up and down, on the theory that a buyer might accept other parcels as substitutes, but they never are equivalents. Hence we think, quite contrary to the defendant’s argument, that a judge is wise, in deciding this issue, to be guided by the impression which the experts make upon him. So far as he is not, he will have to put himself in the position of an expert; and while, to some extent that is something which in the end he cannot escape, it is usually safer, so far as possible, to depend upon the apparent frankness, moderation and sagacity of the witnesses. . . .”

In *Iriarte v. United States*, 157 F. 2d 105, 108, 1946, the court remarked:

“Next the defendants contend that the District Court’s valuation of their lands is ‘plainly against the proof and, at least, contrary to the clear weight of the evidence,’ and is so manifestly inadequate that we ought to set it aside. In answer to this contention it is only necessary first to point out that the Rules of Civil Procedure, 28 U.S.C.A. following section 723c, are applicable to appeals in condemnation proceedings, Rule 81(a) (7) and that Rule 52(a) in so far as it makes findings of fact conclusive is a rule of appellate procedure (*United States v. Lambert*, 2 Cir., 146 F.

2d 469, 471), so that we cannot set aside an award of compensation in cases of this sort unless it is shown to our satisfaction that the trial court's appraisal of value is 'clearly erroneous' (United States v. Delano Park Homes, Inc., 2 Cir., 146 F. 2d 473, 475), and then to say that no such showing can here be made because the evidence of value in this case is highly conflicting, as we shall have occasion to demonstrate more fully hereafter, and the compensation awarded is well within the range of the testimony of the qualified expert witnesses called by the parties. . . ."

Applying these general principles to the case at bar, it seems apparent that the findings of the trial court were not clearly erroneous, but on the contrary were well justified on the basis of the evidence adduced at the trial.

CONCLUSION

Accordingly, it is submitted to the Court that the decision of the lower court awarding the amount of \$440,175 to the Honolulu Plantation Company for its property interest in 440.175 acres of land should be affirmed.

Dated at Honolulu, T. H., this 13 day of April, 1949.

C. NILS TAVARES

VERNON O. BORTZ

Alexander & Baldwin Building,
Honolulu, T. H.

Attorneys for

Honolulu Plantation Company,
Appellee.

Of Counsel:

PRATT, TAVARES & CASSIDY



In the United States Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

HONOLULU PLANTATION COMPANY, APPELLEE

AND

HONOLULU PLANTATION COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

REPLY BRIEF FOR THE UNITED STATES, APPELLANT

A. DEVITT VANECH,

Assistant Attorney General.

JOHN F. COTTER,

*Attorney, Department of Justice,
Washington, D. C.*

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 12,023

UNITED STATES OF AMERICA, APPELLANT

v.

HONOLULU PLANTATION COMPANY, APPELLEE

AND

HONOLULU PLANTATION COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

*UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII*

REPLY BRIEF FOR THE UNITED STATES, APPELLANT

ARGUMENT

**The Award Is For the Land That Was Taken and Not For
Damages To the Remaining Land**

The United States condemned lands which had been leased to the Honolulu Plantation Company. The company had invested in these lands an average of \$1,000 an acre and ordinarily would have shared in the compensation awarded for them. But it had agreed with the fee owners that in the event of condemnation the

entire compensation should be paid to the owners. Consequently, it lost its investment. It is the position of the Government that in the proceedings now being reviewed by this Court, the company under the guise of a claim for severance damages sought to recover that loss.

True, it purported to claim only for damages to its *remaining* property. However, it produced testimony as to the value of the whole plantation before the takings and the value thereafter of the remainder. This is the accepted measure where compensation is sought for both property taken and severance damages to the remainder. Necessarily, it comprehends, in addition to the damages suffered by what is left, the value of the land that has been taken. The company's witnesses, in testifying to the value of all the property before condemnation, appraised it at a figure arrived at by multiplying the number of acres in the plantation at that time by \$1,000. Next, in testifying to the value of the property remaining after condemnation, they appraised it at a figure arrived at by multiplying the diminished number of acres by \$1,000. In the words of the trial court (R. 490), they testified that "a buyer * * * would pay less, at the rate of \$1,000 an acre for each acre taken, for what was left of the plantation's physical property and its permanent improvements."

This is testimony to the obvious. It is simply that the larger plantation that existed before the condemnation would sell for more—\$1,000 an acre more—than the smaller one that remained after the condemnation. And, because the value of the plantation diminished at an exact rate per acre as the plantation lost land, the testimony discloses that the remainder standing alone was worth as much as when it had been part of the larger plantation and that the damages claimed were on account of the lands taken. If, as the trial court con-

cluded, the company's witnesses had meant (R. 491) that the company's "remaining property decreased in value at the rate of \$1,000 an acre for each cane acre taken," they would have discredited completely their theory of appraisal because the remainder would have been worth more than \$1,000 an acre before condemnation.

If support were needed for the Government's position, it is afforded by the company's answer brief. Not an item of the foregoing (a fair summary, it is submitted, of the opening brief for the United States) has been contradicted by the Honolulu Plantation Company.

This Court is not helped by the company's extensive argument (pp. 3-12, 18-35) that severance damages are a part of just compensation. This principle was succinctly stated in the Government's opening brief (pp. 8-9). Equally inapropos is the company's invocation (pp. 33-39) of the well-settled principle now embodied in the Rules of Civil Procedure (52(a)) that: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." In this case there are no conflicting witnesses and consequently no occasion to pass upon their credibility. The company furnished all of the witnesses for severance damage and they agreed as to its amount. From this undisputed testimony the trial court drew the inference of damage to the remainder of the property which resulted in the judgment now under review. As this Court has held, it is at least equally capable of drawing a conclusion as to the meaning of this testimony and so is not bound by the conclusion reached by the trial judge. *Adams County v. Northern Pac. Ry. Co.*, 115 F. 2d 768, 779 (1940); *Smith v. Royal Ins. Co.*, 125 F. 2d 222, 224 (1942), certiorari denied 316 U. S. 695; *Carr v. Southern Pac. Co.*, 128 F. 2d 764, 768 (1942).

The appellate courts of other circuits without exception apply the same rule. *Kuhn v. Princess Lida of Thurn and Taxis*, 119 F. 2d 704, 705-706 (C.C.A. 3, 1941); *Stubbs v. Fulton Nat. Bank of Atlanta*, 146 F. 2d 558, 560 (C.C.A. 5, 1945), certiorari denied 325 U. S. 864; *Campana Corporation v. Harrison*, 114 F. 2d 400, 405-406 (C.C.A. 7, 1940); *Sun Insurance Office v. Be-Mac Transport Co.*, 132 F. 2d 535, 536 (C.C.A. 8, 1942); *Crutcher v. Joyce*, 146 F. 2d 518, 520 (C.C.A. 10, 1945).

The company admits (pp. 13-16) that it relinquished in its leases its right to share in the compensation awarded for the condemned lands. Its argument that it retained the right to claim severance damages would knock down another straw man: the Government makes no contention to the contrary.

The nature of the claim brought forward in the case at bar is of course disclosed by the company's earlier unsuccessful petition to Congress. The company does not deny that the claim was accurately described in the Government's opening brief. Its argument (pp. 5, 17) that the Government has gone outside the record is unwarranted. The statements in the Government's brief were derived from the committee report which is in the record (R. 1542-1566). It is assumed that the company will not assert that in recommending action in its favor the committee misunderstood or misstated its claim.

The company's explanation that the \$1,000 an acre used by its witnesses represented average rather than actual investment per acre (pp. 5-12) is unnecessary. That was made plain in the Government's opening brief at pp. 3-5 and 10 and its appeal in no degree depends upon a misunderstanding of the company's method of valuation. When regard is had to the diverse character of the congeries of properties involved, it is manifest that the method was highly formulary and unrealistic

and hence objectionable. See e.g., *Minnesota Rate Cases*, 230 U. S. 352, 434. No doubt it was employed as an apt device for setting up the \$1,000-an-acre claim. The desired result could not have been produced by acceptable appraisals. In any event, the suggestion that each acre taken was not in fact worth \$1,000 falls far short of an assertion that any or all of them were valueless. Since the difference between value before and after condemnation necessarily includes whatever value inhered in the condemned acreage, it follows that the award (calculated on that basis) is for more than the diminution in the value of the remainder. Therefore, even if the company were entitled to something, it clearly cannot recover the \$440,175 awarded by the judgment appealed from.

CONCLUSION

For the foregoing reasons, it is submitted that so much of the judgment as awards the company compensation for "severance damages" should be reversed.

Respectfully,

A. DEVITT VANECH,
Assistant Attorney General.
 JOHN F. COTTER,
Attorney, Department of Justice,
Washington, D. C.

MAY 1949.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

vs.

HONOLULU PLANTATION COMPANY,
Appellee,

and

HONOLULU PLANTATION COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR HONOLULU PLANTATION COMPANY, APPELLANT

On Appeal from the United States District Court
For The District of Hawaii

C. NILS TAVARES
VERNON O. BORTZ

Attorneys for Appellant
Honolulu Plantation Company

Of Counsel:

PRATT, TAVARES & CASSIDY
Alexander & Baldwin Bldg.
Honolulu, T. H.

FILED
MAR 1 1949

PAUL P. O'BRIEN

CLERK

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IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	<i>Appellant,</i>
vs.	
HONOLULU PLANTATION COMPANY,	<i>Appellee,</i>
and	
HONOLULU PLANTATION COMPANY,	<i>Appellant,</i>
vs.	
UNITED STATES OF AMERICA,	<i>Appellee.</i>

**BRIEF FOR HONOLULU PLANTATION
COMPANY, APPELLANT**

**On Appeal from the United States District Court
For The District of Hawaii**

OPINION BELOW

The opinion of the district court (R. 461-504) is reported at 72 F. Supp. 903.

STATEMENT OF THE PLEADINGS AND THE FACTS

This is a cross-appeal by the Honolulu Plantation Company, defendant in the consolidated thirteen condemnation cases in the Court below, from that portion of the final judgment of the District Court of the United States for the District of Hawaii entered on November 5, 1947, which disallows just compensation for severance damages suffered by said Honolulu Plantation Company through the taking of its interest in 595.01 acres of cane land covered by those certain agreements executed by and between

the trustees of the Damon Estate and said Company. The judgment was entered pursuant to the decision of the Court made and entered on August 22, 1947. (R. p. 504.)

This consolidated proceeding originally involved thirteen (13) separate proceedings against several defendants, including the Honolulu Plantation Company, which latter Company was named as defendant in each and all of the thirteen proceedings. The jurisdiction of the district court was invoked under section 201 of the Act of March 27, 1942, 56 Stat. 176, 177, 50 U.S.C. sec. 171 (a).

An order and judgment of taking was entered by the Court in each of the thirteen proceedings. (R. Index P.IV.)

A motion for consolidation of seven of the thirteen cases, to wit: Civil Cases Nos. 514, 525, 529, 533, 535, 544 and 548, together with an affidavit for consolidation of actions was filed by the Honolulu Plantation Company on February 17, 1945 (R. p. 427); and on the same date, pursuant to a stipulation between counsel for the United States of America and the Honolulu Plantation Company, an order of the Court was entered consolidating the said six proceedings into one proceeding. (R. p. 433.)

A motion for consolidation of six of the proceedings, to wit: Civil Cases Nos. 521, 527, 532, 536, 540 and 684 and the proceedings consolidated by order of the Court dated February 17, 1945, together with an affidavit for consolidation of actions was filed by the Honolulu Plantation Company on October 9, 1946. (R. p. 441.) After a hearing on the motion on November 14, 1946, the Court granted said motion and an order consolidating all thirteen proceedings into one proceeding, insofar as the Honolulu Plantation Company was concerned, was entered by the Court on November 22, 1946. (R. p. 459.) The order provided further that the trial be had in the same manner as if all of said takings had been in one proceeding. On the trial of the consolidated proceedings, the date of the first taking, June 21, 1944, was adopted by the Honolulu

Plantation Company as the date of taking in all thirteen condemnation cases. No formal objection to said date was raised by counsel for the Government and, as a result, June 21, 1944, is to be considered the date of all of the takings herein.

Defendant, Honolulu Plantation Company, answered (R. 31, 64, 83, 106, 319, 350, 423) alleging, among other things, that at the time of the filing of the several petitions for condemnation and for many years prior thereto, the Honolulu Plantation Company had occupied and cultivated the lands taken in each of the thirteen proceedings as integral parts of a sugar plantation operated and conducted by it at Aiea adjacent to Pearl Harbor, and in connection with other large and contiguous tracts situated outside the lands described in each petition but comprised within the said Plantation and demised to said Honolulu Plantation Company by a number of leases. Defendant alleged further that by the taking of the said lands described in each of said petitions, the integrity of said sugar Plantation was destroyed and the unitary value of the leasehold interests and estates of the Company in other contiguous tracts of lands was greatly impaired and diminished; that the value of the physical properties remaining after the takings was greatly depreciated due solely to the severance of the lands involved in these takings from the properties operated as a unit by the Company as a sugar plantation. Wherefore, said defendant prayed that the damages suffered by reason of the taking of said lands and properties be determined and the amount awarded and paid to said Honolulu Plantation Company.

A jury-waived trial was held from December 2, 1946, to January 15, 1947, inclusive, except for recesses for the holidays and for other reasons.

The Court awarded damages upon the following basis:

1. For the lands and improvements owned in fee by the Honolulu Plantation Company—\$38,988.00.

2. For a concrete supply ditch constructed upon land leased from (1) Bishop Estate and (2) the Oahu Railway & Land Co.—\$15,585.00.

3. Severance damages—\$440,175.00—said damages being measured upon the basis of 440.175 acres only, the Court finding that the Honolulu Plantation Company did not have such an estate or interest in the 595.01 acres of land held under the Damon lease as to entitle it to compensation in these proceedings. (R. p. 503 et seq.)

On February 3, 1948, within the time prescribed by law, the United States of America, petitioner in the Court below, duly filed a notice of appeal to this Court (R. p. 508) and on the same date the Honolulu Plantation Company duly filed a notice of cross-appeal to this Court (R. p. 509). Said appeal and said cross-appeal have been perfected to this Court.

The jurisdiction of this Court is invoked under the provisions of Section 128 of the Judicial Code, as amended, now 28 U.S.C. Sec. 1291.

STATEMENT OF THE CASE

From about the year 1899, the Honolulu Plantation Company, a California corporation, operated continuously a sugar plantation on the Island of Oahu, Territory of Hawaii, at Aiea, adjacent to Pearl Harbor. The principal operations of the enterprise were the growing of sugar cane and the processing of sugar therefrom. Because it leased all but a very small portion of the lands used in its operations, it was known in Hawaii as a leasehold plantation. Upon the lands so held, which were contiguous, it had constructed a sugar mill, a railroad system, a system of roads, camps for its employees, wells, pumps, irrigation systems, and other properties which formed a part of the sugar plantation enterprise. The sugar mill and related facilities and the principal camps for employees were located on lands owned in fee by the Company, which lands were

situated almost in the center of the integrated plantation. All of these structures, fixtures, appurtenances, and improvements were necessary to the maintenance and operation of a plantation for the growing of sugar cane and the processing of the cane into sugar. All of these properties were part of a single integrated property and were operated as a unit devoted as a whole to the raising of cane and the processing of that cane into sugar. The mill, railroads, roads, camps, wells, pumps, irrigation systems and other properties of the Company were constructed and built to operate a 36,000-ton plantation.

About the year 1939, the United States began to take properties of the Honolulu Plantation Company for military and naval purposes. These properties were taken piecemeal, but up to the beginning of World War II had resulted in bringing the plantation down to about a 21,000-ton plantation. As a result of the needs and demands of the Army and Navy caused by World War II, the Government in these present proceedings acquired some 1,364.35 acres, more or less, formerly held under lease or in fee by the cross-appellant of which 1,087.59 acres were sugar cane land devoted to the purpose of raising sugar cane. As a result of these takings, the cane acreage of the Company was reduced from about 4,397.34 acres to approximately 3,309.75 acres, and it was reduced from a 21,000-ton to about a 15,000-ton sugar plantation.

As a result of the takings in these proceedings, the physical properties of the Honolulu Plantation Company remaining after the takings were greatly depreciated in value due solely to the severance of the lands involved in these takings from the properties operated as a unit by the Company as a sugar plantation. The market value of all of the real properties of the Company held before the takings and forming the integrated enterprise owned and conducted by cross-appellant was far higher than the market value or the fair value of the real property of said inte-

grated unit remaining after the takings. The difference between those values is the amount the Company suffered in damages by reason of the severance.

The District Court in its decision awarded severance damages to the Honolulu Plantation Company upon the basis of \$1,000 per acre for 440.175 acres, or a total of \$440,175. The Court did not award severance damages in connection with the 595.01 acres of land held under the Damon title on the theory that the Company did not have an estate or interest in those lands which would entitle it to compensation in these proceedings.

The principal question presented on this cross-appeal is whether or not cross-appellant possessed such a property interest in the Damon lands as to entitle it to just compensation by way of severance damages under the Constitution of the United States.

SPECIFICATIONS OF ERROR

1. The District Court erred in finding that appellant Honolulu Plantation Company did not have such a property interest in the land held by it under the Damon title as to entitle it to just compensation by way of severance damages under the 5th Amendment of the Constitution of the United States.

2. The District Court erred in not finding that appellant Honolulu Plantation Company was entitled to just compensation for severance damages suffered by said Company through the taking of said Company's property interest in 595.01 acres of cane land held by it under those certain agreements executed by and between the Trustees of the Damon Estate and said Company.

3. The District Court erred in not awarding appellant Honolulu Plantation Company the amount of \$595,010 as just compensation for severance damages suffered by said Company through the taking of said Company's property interest in 595.01 acres of cane land held by it under those

certain agreements executed by and between the Trustees of the Damon Estate and said Company.

4. The District Court erred in not awarding said Company the amount of \$1,035,185 as severance damages.

QUESTIONS INVOLVED

1. Does the Honolulu Plantation Company have such a property interest in the land held by it under those certain agreements executed by and between the Trustees of the Damon Estate and said Company as to entitle the latter to just compensation by way of severance damages under the Fifth Amendment of the Constitution of the United States?

2. Is the Honolulu Plantation Company entitled to just compensation in the amount of \$595,010 for severance damages suffered by it through the taking of its property interest in 595.01 acres of cane land held by it under those certain agreements executed by and between the Trustees of the Damon Estate and said Company?

SUMMARY OF ARGUMENT

1. Where real property is condemned by the sovereign, a person other than the owner of the fee is entitled to compensation if he possesses an "interest" or "estate" in the land. By virtue of those certain agreements executed by and between the Honolulu Plantation Company and the Trustees of the Damon Estate, the Honolulu Plantation Company held a lease, or in the alternative, an agreement to lease in connection with the Damon lands and thus owned such a property interest in said lands as to entitle it to just compensation.

2. Where a part of a tract of land is taken for public use, the just compensation to which the owner of an interest therein is entitled includes the damages to the remainder of the tract resulting from the taking, in addition to the value of the land taken. As a result of the takings in these proceedings, the physical properties of the Honolulu Plantation

Company remaining after the takings were depreciated in value because of the severance of the lands taken from the properties operated as a unit by the Plantation. The difference between the market value of all of the real properties of the Company held before the takings and forming the integrated enterprise owned and conducted by the Company and the market value of the same property remaining after the takings is the amount the Company suffered in damages by reason of the severance.

ARGUMENT

I.

THE DISTRICT COURT ERRED IN FINDING THAT THE HONOLULU PLANTATION COMPANY DID NOT HAVE SUCH A PROPERTY INTEREST IN THE LAND HELD BY IT UNDER THE DAMON TITLE AS TO ENTITLE IT TO JUST COMPENSATION BY WAY OF SEVERANCE DAMAGES UNDER THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES. (Statement of Points on which Cross-Appellant intends to rely on Cross-Appeal, Point (1) Record p. 516.)

Under the date of June 27, 1927, a written indenture of lease was entered into by and between the Trustees of the Damon Estate and Honolulu Plantation Company (Ex. 9K, R. p. 1513). The term of said lease was for a period of fifteen years from January 1, 1929, and consequently said term expired on December 31, 1943. By a letter dated October 18, 1940, more than three years prior to the expiration of the lease referred to above, the Trustees of the Damon Estate offered to lease certain areas of land, therein more particularly set forth, to the Honolulu Plantation Company upon certain conditions for a term of ten years from the expiration of the then current lease (Ex. 9K, R. p. 1513). This communication, it is to be noted, recites in detail the proposed agreement between the parties. The letter clearly states an offer by the Trustees of the Damon

Estate to presently demise the property upon terms therein set forth which are both comprehensive and definite.

By a letter dated October 21, 1940 (Ex. 9K, R. p. 1513), C. Brewer & Company, acting as agent for the Honolulu Plantation Company, accepted the offer contained in the communication from the Trustees of the Damon Estate. It is the position of the Honolulu Plantation Company that the above mentioned letters of offer and acceptance constitute a contract. Whether or not such a contract be considered as a lease or agreement to lease is immaterial insofar as the rights of the Honolulu Plantation Company to recover in these consolidated proceedings is concerned. To assist the Court in determining whether this contract is a lease or an agreement to lease, we shall endeavor to present the argument in favor of the contract constituting a lease and, in the alternative, in favor of the contract constituting an agreement to lease. It is contended that whichever view is taken by the Court, the Honolulu Plantation Company is entitled to recover just compensation for the interest held by it under the so-called Damon title, which interest was taken by the United States in these proceedings.

1. BY VIRTUE OF CERTAIN CORRESPONDENCE BETWEEN THE HONOLULU PLANTATION COMPANY AND THE TRUSTEES OF THE DAMON ESTATE, THE COMPANY HELD A LEASE ON THE SO-CALLED DAMON LANDS.

There is, of course, a real distinction between a lease and an agreement to lease insofar as the rights and liabilities of the parties are concerned.

In *Thompson on Real Property* (1940, Vol. 3, p. 293, Section 1214), it is said:

“Although the line separating present leases from agreements for a future demise is often difficult to distinguish, there is a marked difference in the rights of the parties under the two contracts. By a lease the lessee acquires an estate in the land, by an agreement for a lease he merely acquires an executory right to have the owner convey him an estate for breach of

which he has a claim for damages or a possible right to specific performance in equity. It constitutes an ambiguity for which a complaint will be bad on demurrer to allege an agreement for a lease and to state contracts which constitute an actual lease. Whether an instrument is a lease or an agreement to lease, the owner has a cause of action if the other party refuses without just cause to perform his agreement."

There is no reason to believe that the law of Hawaii is not in accord with this general statement. The difficult question arises, however, in determining whether a contract in a given case constitutes a lease or an agreement to lease. The answer to such an inquiry depends upon the intent of the parties as manifested by the contract between them.

In *Thompson on Real Property* (1940, Vol. 3, p. 293, Section 1215), the author says:

"The intention of the parties as manifested by the language of the instrument is the controlling element in determining whether it is a lease or a mere executory agreement. The test of intention in regard to making a lease or an agreement to lease is whether the agreement leaves anything incomplete. If it does not, it may operate as a present demise. The law seems to be settled that when an agreement leaves nothing to be done and gives the lessee an immediate right to possession, it is a lease, passing a present estate in the land. If the words used imply an immediate demise, with no stipulation for a further lease, the term, rent, and manner of occupation being all explicitly stated, it confers all the rights of a lessee upon the contracting party. In every case where an agreement has been held not to operate by passing an interest but to rest in contract, there has been either an express agreement for a further lease, or construing the agreement to be a lease in praesenti would work a forfeiture, or the terms have not been fully settled, or something further was to be done. . . . However, where there were apt words of present demise, and the tenant went into

possession and occupied thereunder, such instrument has been construed as a present demise rather than as an agreement for a lease, notwithstanding it contained a covenant for the execution of a more perfect and formal lease."

An examination of the correspondence between the parties (Ex. 9K, R. p. 1513) indicates strongly that the parties intended a present demise which was to become effective upon the termination of the then existing lease. The letters of October 18, 1940, and October 21, 1940, form the basis of an agreement which identifies and describes the property to be leased with sufficient definiteness. The term is designated and the rental is specified. All of the elements necessary to the validity of a lease are present in the agreement. It has been held that where a lessee has entered into possession and occupied premises under an instrument which is ambiguous, the Courts will consider the acquiescence of the lessor and give effect to the instrument as a present demise. *Jackson Ex. Dem. Livingston v. Kisselbrack*, 10 Johns. (N.Y.) 336, 6 Am. Dec. 341. It has also been held that such an entry and occupation is strong evidence that the parties intended a present demise. *Hallett v. Wylie*, 3 Johns. (N.Y.) 44, 3 Am. Dec. 457. The Honolulu Plantation Company continued in possession of the premises after the expiration of the 1927 lease, paying the rentals set forth in the letter agreement and complying in all other respects with the new agreement as set forth in the correspondence indicated above.

Mr. P. E. Spalding, attorney-in-fact for Honolulu Plantation Company and president of C. Brewer & Company, who was instrumental in the negotiation of the new lease, testified that he believed that the Honolulu Plantation Company had a lease on the Damon lands in question by virtue of the exchange of letters referred to above. (R. p. 1113, et seq.)

The only real question presented is in connection with the statements contained in the letters in Exhibit 9K with respect to the execution of a formal lease at a future time. It may be true that the fact that the parties contemplate the execution of a formal lease in the future may show that the agreement is a contract for a lease rather than a lease itself. But it is submitted to the Court that this is not necessarily so, especially, as in this case, where the facts indicate that the parties intend that the agreement shall operate as a lease.

In the case of *Wong Kwai v. Dominis*, 13 Haw. 471, the question presented to the Court was whether a certain lease was an offer to lease the land and, if so, whether the offer was accepted and the legal effect of such acceptance. The letter containing the offer of lease included a statement that, if the offer were accepted, the offeror would immediately draw up a formal document at a future date.

The Court, in affirming the decree of the lower court granting the specific performance of the agreement, said as follows:

“The fact that a formal lease was contemplated did not prevent the letter and the acceptance of its terms from constituting a final binding contract, the preparing and signing of the lease being merely in execution of the contract. . . .”

At the time of the takings involved herein, the Honolulu Plantation Company was in possession of the premises under what it considered to be a valid lease. The Company was paying a different and higher rent than was provided for in the 1927 lease. (R. p. 1202.) All of the other covenants in the new agreement were being carried out in accordance with the understanding between the parties. Substantial expenditures were made on the Damon lands in reliance on the validity of the lease. (R. p. 1202.) In view of these facts, it is submitted that it was the intention of

the parties that the agreement was to constitute a lease of the premises.

The District Court allowed severance damages on 440.175 acres of land on the theory that the Company had a substantial leasehold estate in said lands. (R. p. 496.) The Court expressly dismissed from consideration the 595.01 acres of land held under the so-called "Damon Lease" because the Court found that on June 21, 1944, the date of the takings, the Honolulu Plantation Company did not have such an interest in the lands held under the Damon title as to entitle it to severance damages. (R. p. 503.) If the contract constituted a lease of the Damon lands, it seems clear that the Honolulu Plantation Company would be entitled to compensation for the 595.01 acres here involved on the same basis as the award made by the Court for severance damages in connection with the taking of the 440.175 acres of land; i.e., at the rate of \$1000 per acre.

The Court is referred to Paragraphs II and III of this brief for the argument of the general theory on which the Company's case for severance damages for all of the leasehold lands is based.

2. IN THE ALTERNATIVE, BY VIRTUE OF CERTAIN CORRESPONDENCE BETWEEN THE HONOLULU PLANTATION COMPANY AND THE TRUSTEES OF THE DAMON ESTATE, THE COMPANY HELD AN AGREEMENT TO LEASE ON THE SO-CALLED DAMON LANDS.

It is submitted to the Court that even if it be assumed that the letters of October 18, 1940, and October 21, 1940 (Exhibit 9K, R. p. 1513), constitute a contract to lease rather than a lease itself, the Honolulu Plantation Company is entitled to recover just compensation for severance damages suffered by the Company by virtue of the taking of its property interest in 595.01 acres of cane land held by it under those certain agreements executed by and between the Trustees of the Damon Estate and the Honolulu Plantation Company.

As a general rule, where property is condemned by the sovereign for a public use, a person other than the owner of the fee is not entitled to compensation unless he possesses an "interest" or "estate" in the land as distinguished from a purely contractual right. If a claimant is the holder of a life estate, a term for year or other recognized interest in land taken in the eminent domain proceedings, there is, of course, no question concerning his right to share in the award. The real problem arises where the interest in land does not come within any of the usual and customary classifications of interests or estates in land and more specifically where the particular interest is less than an estate for years.

It is the contention of the appellant herein that by virtue of the contract to lease with respect to the Damon Tract, it possessed an interest or estate in land which had a direct and concrete connection with the land condemned and that it is entitled to compensation for the taking of such interest. So far as we have been able to determine, the question as to whether a contract to lease confers an interest or right sufficiently related to land to entitle the owner thereof to compensation has never been presented to a court for adjudication. It is believed, however, that when the suggested theory is examined in the light of recent decisions of the Circuit Courts of Appeal and the U. S. Supreme Court, the Court will conclude that, under the circumstances of the present case, the possessor of such a right is entitled to compensation.

The basic principle underlying the law of eminent domain is best illustrated by the words set forth in the Fifth Amendment to the United States Constitution: "...nor shall private property be taken for public use, without just compensation."

In commenting upon the use of the word "property," Professor Hohfeld remarks as follows:

“Both with lawyers and with laymen this term has no definite or stable connotation. Sometimes it is employed to indicate the physical object to which various legal rights, privileges, etc., relate; then again — with far greater discrimination and accuracy — the word is used to denote the legal interest (or aggregate of legal relations) appertaining to such physical object. Frequently there is a rapid and fallacious shift from the one meaning to the other. At times, also, the term is used in such a ‘blended’ sense as to convey no definite meaning whatever.”¹

It seems evident that the writer is suggesting the use of two entirely different concepts, one physical, involving the conception of property as a physical object, and the other a mental concept, concerned with the legal relations of persons in exercising control over physical objects. The history of eminent domain law in the United States illustrates very clearly the transition from a purely physical conception of property to the conception of property as a word expressing every species of right and interest which may be enjoyed by a person in connection with property and upon which it is possible to put a money value.

To show the changing concepts regarding eminent domain law held by the courts over a period of years, we shall refer briefly to a number of cases.

Illustrative of the purely physical concept of the eminent domain process is the following excerpt from the case of *Monongahela Navigation Co. v. Coons*, 6 Watts & S., 101 (Pa. 1843):

“Now, it cannot be said that the plaintiff’s mill was taken or applied, in any legitimate sense, by the State, or by the company invested with its power; nor can it be said he was deprived of it. . . . It is true, that a nuisance by flooding a man’s land was originally considered so far a species of ouster, that he might have

¹ Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and other legal essays*. (1923) p. 28.

had remedy for it by assize of novel disseisin, or assize of nuisance, at his election; but we are not to suppose that the framers of the Constitution meant to entangle their meaning in the mazes of the *jus antiquum*. It was aptly said by Chief Justice Tilghman, in *The Farmers' and Mechanics' Bank v. Smith* (3 Serg. & Rawle 69), that conventions to regulate the conduct of nations are not to be interpreted like articles of agreement at the common law; and that where multitudes are to be affected by the construction of an instrument, great regard should be paid to the spirit and intention. And the reason for it is an obvious one. A constitution is made, not particularly for the inspection of lawyers, but for the inspection of the million, that they may read and discern in it their rights and their duties; and it is consequently expressed in the terms that are most familiar to them. Words, therefore, which do not of themselves denote that they are used in a technical sense, are to have their plain, popular, obvious, and natural meaning; and, applying this rule to the context of the Constitution, we have no difficulty in saying that the State is not bound beyond her will to pay for property which she has not taken to herself for the public use."²

In another early decision in which the court denied compensation where the claimant sought damages for the loss suffered by the construction of a railroad adjacent to his land, the court remarked:

"The prohibition of the constitution is against taking private property without compensation, and not against injuries to such property, where it is not taken. In this case, the private property of the plaintiffs is not taken by the defendants; but the whole allegation is, that it is injured by erections in its vicinity; and the plaintiffs have not, therefore, any claim to have their damages ascertained and paid for before such erections shall be constructed or used."³

² To be distinguished from the case of *Monongahela Nav. Co. v. U. S.*, 148 U.S. 312, 37 L. Ed. 463.

³ *Drake v. Hudson River R. Co.*, 7 Barb. 508, 559 (N.Y.) 1849.

The gradual abandonment of the physical concept is well illustrated by the case of *Thompson v. Androscoggin Co.*, 54 N.H. 545 (1874), in which the court said:

“Property in land must be considered, for many purposes, not as an absolute, unrestricted dominion, but as an aggregation of qualified privileges, the limits of which are prescribed by the equality of rights, and the correlation of rights and obligations necessary for the highest enjoyment of land by the entire community of proprietors. . . . Property is taken, when any one of those proprietary rights is taken, of which property consists.”

In recent years the problem of the proper concept to be adopted by the courts has been raised in connection with eminent domain proceedings involving the question as to what parties possessed property interests entitling them to compensation. It seems clear that the basic question involved in such cases is whether or not the claimant possesses an “interest” or “estate” in land sufficient to entitle him to compensation.

In the case of *U. S. v. 531¼ Acres of Land*, 139 F. 2nd, 244 (1943) the Government took title to certain lands by condemnation proceedings. The mortgagee of the leasehold possessed a right of redemption under a statute permitting redemption after the termination of a lease. It was contended that with title vested in the United States, the mortgagee was not the owner of any estate or interest in or lien upon the premises, having only a statutory right to redeem on a certain date. It was argued that it was merely privileged to enter into a contractual relationship as a tenant of the city and was not the owner of a compensable property right. In answer to this contention, the court remarked as follows:

“... We see no reason to grope about in the mysterious world of ‘estates’ and ‘interests not estates.’ The law of New York has put the matter on a very prac-

tical basis: a right with respect to property taken in condemnation may be so remote or incapable of valuation that it will be disregarded in awarding compensation; otherwise it will not be disregarded . . .”

In *Brooklyn Eastern District Terminal v. New York*, 139 F. 2nd 1007 (1944), the question presented to the court was whether the Brooklyn Terminal possessed an interest in land by virtue of a contract it had with the City of New York for purposes of providing a freight terminal for the City’s market as to entitle it to share in the award made to the City upon the condemnation of the market by the Government. Under the terms of the agreement between the parties, the Terminal was to operate the freight terminal at the market for a period of ten years with a right of renewal for an additional ten years and at the termination of the agreement, the facilities were to become the property of the City.

In the words of the court:

“... It is clear that unless petitioner’s rights and privileges here amount to an estate or interest in the lands within the statutory meaning it is not entitled to share in the award, whatever possible claims it might conceivably have in some other forum on the basis of a frustrated contract or otherwise. Cf. *New York Telephone Co. v. United States*, 2 Cir, 136 F. (2d) 87; *Omnia Commercial Co. v. United States*, 261 US 502, 43 S Ct 437, 67 L ed 773. If, therefore, the district court is correct that petitioner had only a contract with respondent making it respondent’s agent to supply freight facilities to the Market, then the denial to it of a share in the award was correct . . .”

The court, citing with approval the case of *United States v. 531¼ Acres of Land*, supra, held that the above mentioned contract was sufficient to create a substantial interest in the land entitling the claimant to share in the award made to the owner upon the condemnation of the land by the United States.

In *United States v. General Motors Corporation*, 323 U.S. 373, 89 L. Ed. 311, the court said:

"The critical terms are 'property,' 'taken' and 'just compensation.' It is conceivable that the first was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. On the other hand, it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. In point of fact, the construction given the phrase has been the latter. When the sovereign exercises the power of eminent domain it substitutes itself in relation to the physical thing in question in place of him who formerly bore the relation to that thing, which we denominate ownership. In other words, it deals with what lawyers term the individual's 'interest' in the thing in question. That interest may comprise the group of rights for which the shorthand term is 'a fee simple' or it may be the interest known as an 'estate or tenancy for years,' as in the present instance. The constitutional provision is addressed to every sort of interest the citizen may possess.

"In its primary meaning, the term 'taken' would seem to signify something more than destruction, for it might well be claimed that one does not take what he destroys. But the construction of the phrase has not been so narrow. The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking. Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking."

In the case of *Monongahela Navigation Co. v. United States*, 148, U.S. 312, 37 L. Ed. 463, the court said:

". . . Our conclusions are, that the Navigation Company rightfully placed this lock and dam in the Monongahela river; that, with the ownership of the tangible

property, legally held in that place, it has a vested franchise to receive tolls for its use; *that such franchise was as much a vested right of property as the ownership of the tangible property*; that the right of the national government, under its grant of power to regulate commerce, to condemn and appropriate this lock and dam belonging to the Navigation Company, is subject to the limitations imposed by the 5th Amendment, that private property shall not be taken for public uses without just compensation; that just compensation requires payment for the franchise to take tolls, as well as for the value of the tangible property; and that the assertion by Congress of its purpose to take the property does not destroy the state franchise." (Italics supplied.)

It is submitted that the test adopted by the courts in the above mentioned cases in determining the right of a claimant to recover is based on the question as to whether the right taken in condemnation is capable of valuation. If the claimant has been damaged by the taking of his interest with respect to real property and such damage is capable of valuation, he is entitled to share in the compensation. Where a claimant's interest is manifested by a contract for a lease, it seems clear that he is entitled to share in the award and it is immaterial whether such compensation is paid on the theory that every person having an estate or interest at law or in equity in the land taken is entitled to share in the award or on the theory that the taking of the leasehold by the Government resulted in the appropriation or frustration of the contract itself.

It seems clear that the agreement to lease in the instant case could have been specifically enforced on the well-recognized theory that the proposed lessee is to be regarded in equity as the holder of a lease under the terms set forth in the agreement. In code jurisdictions where the distinction between equitable and common law remedies has been abolished, it has been held that for all practical purposes:

the proposed tenant actually holds under the contemplated lease. *Weed v. Lindsay*, 88 Ga. 686, 15 S.E. 836; *International Harvester Co. v. Shreveport Nu-Grape Bottling Co.*, 13 La. App. 222, 127 So. 47. During the term and so long as the Honolulu Plantation Company was not in default, the lessor would not be able to maintain an ejectment proceeding against the Company. Thus, the Honolulu Plantation Company possessed a continuing right to use the lands in question for the purpose of growing sugar cane just as though it had a formal lease on the premises.

While it is conceded that under the Fifth Amendment, the Government has virtually unlimited power to take property for public use, the owner thereof must be compensated for his interest in the lands taken.

The Court's attention is directed to the following excerpt from the case of *U. S. v. 9.94 Acres of Land, in City of Charleston*, 51 F. Supp. 478 (1943):

"... After all, the intent of the Fifth Amendment to the Constitution is that while the government has power, with practically no limitation, to take property, nevertheless, the owner is to be treated fairly and his rights maintained. It is the duty of a court to attempt as nearly as possible to put the owner in as good a place as he was before the taking. In my opinion he is entitled to receive a definite fixed payment representing the value of his property at the time of the taking. If this taking be of a fee simple title the rules under which to ascertain the compensation are well fixed and known. See particularly *United States v. Miller*, supra. On the other hand, if the estate is anything less, then it is a question of fact for the jury to give due consideration to what, if anything, is left to the land owner, and when it has found a value of that it should be deducted from the full value of a fee simple title. This to me more nearly approaches a definition of just compensation and fair dealing with an owner than any other suggestions that have been made.

"It may be suggested that the government should not be put to the jeopardy and risk of a finding which might be in part speculative because of the uncertainty of all the conditions surrounding the taking of the property. The same argument applies with equal force to the owner. And since it is the government which has determined to take the property and has determined the state in and manner of taking, if either party is to run the risk of a loss because of changes in the future, it would seem to be just that this be assumed by the party who is in control of and has determined the status of the case. . . ."

It appears to be well settled that valid contracts are property protected by the Fifth Amendment and that in the event they are appropriated by eminent domain proceedings, the owner is entitled to just compensation therefor. *Brooks-Scanlon Co. v. United States*, 265 U.S. 106, 68 L. Ed. 934 (1924).

Similarly, it would appear that the appropriation or frustration of contract rights incidental to the taking of other property may be compensable if the contract is related directly to the land taken. *A. W. Duckett & Co. v. United States*, 266 U.S. 149, 69 L. Ed. 216.

In conclusion, it is submitted to the Court that the modern concept of property rights as enunciated in the Brooklyn Terminal case, *United States v. 531¼ Acres of Land*, General Motors case, and others requires the payment of just compensation where contract rights are taken in an eminent domain proceeding. At the time of the takings in the present case, the Honolulu Plantation Company was in possession of the premises under at least a contract to lease. The Company was paying rentals in accordance with the terms of the agreement. It had made substantial expenditures on its plant as a whole, and on the Damon lands in particular, in reliance on the validity of the lease. The takings by the Government in this proceeding resulted in the appropriation and/or frustration of that contract to

lease. Under the authorities set forth above, the Honolulu Plantation Company as the owner of a contract right directly related to the lands taken is entitled to compensation therefor.

II.

THE DISTRICT COURT ERRED IN NOT FINDING THAT THE HONOLULU PLANTATION COMPANY WAS ENTITLED TO JUST COMPENSATION FOR SEVERANCE DAMAGES SUFFERED BY SAID COMPANY THROUGH THE TAKING OF ITS PROPERTY INTEREST IN 595.01 ACRES OF CANE LAND HELD BY IT UNDER THOSE CERTAIN AGREEMENTS EXECUTED BY AND BETWEEN THE TRUSTEES OF THE DAMON ESTATE AND SAID COMPANY.

III.

THE DISTRICT COURT ERRED IN NOT AWARDING THE HONOLULU PLANTATION COMPANY THE AMOUNT OF \$595,010 AS JUST COMPENSATION FOR SEVERANCE DAMAGES SUFFERED BY SAID COMPANY THROUGH THE TAKING OF ITS PROPERTY INTEREST IN 595.01 ACRES OF CANE LAND HELD BY IT UNDER THOSE CERTAIN AGREEMENTS EXECUTED BY AND BETWEEN THE TRUSTEES OF THE DAMON ESTATE AND SAID COMPANY. (Statement of Points on which Cross-Appellant intends to rely on Cross-Appeal, Points (2) and (3) Record p. 517.)

The District Court in its decision awarded severance damages to the Honolulu Plantation Company upon the basis of \$1,000 per acre for 440.175 acres, or a total of \$440,175. The Court did not award severance damages in connection with the 595.01 acres of land held under the Damon title on the theory that the Company did not have an estate or interest in those lands which would entitle it to compensation in these proceedings. While cross-appellant's opening brief is concerned particularly with a discussion of the law and the evidence relative to the right of the Company to compensation for the 595.01 acres involved in the Damon title, it appears advisable to summarize briefly the basic theory on which cross-appellant's

entire case is founded even though the argument will also be presented in appellee's answer to appellant's opening brief.

One of the principal issues before the District Court and the only issue involved in the present appeal and cross-appeal is whether or not the Honolulu Plantation Company is entitled to severance damages because of the taking of certain of the lands in these proceedings. No evidence was introduced by the Government relative to severance damages, the latter taking the position that the Honolulu Plantation Company was not entitled to severance damages as a matter of law. Accordingly, under well established rules of law, the Appellate Court must regard the findings of the trial court with relation to severance damages if adequately supported by the evidence, as conclusive and binding.

In order to assist the Court to the fullest extent in resolving the question of severance damages, it is believed advisable to first present the law applicable to that phase of the case and then to discuss the evidence. The law clearly allows the severance damages in question if they are proved and the evidence adduced clearly shows that the Company was damaged.

It is clear that the property taken was mainly leasehold property and to a great extent the property remaining was leasehold property, though it should be pointed out that the sugar mill and the major part of the irrigation system and camps for employees which were located on fee lands owned by the Company suffered the greatest severance damages. The fact that the property taken was leasehold rather than fee has, of course, no bearing on the rights of the Honolulu Plantation Company insofar as severance damages are concerned.

"The critical terms are 'property,' 'taken' and 'just compensation.' It is conceivable that the first was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights

recognized by law. On the other hand, it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. In point of fact, the construction given the phrase has been the latter. When the sovereign exercises the power of eminent domain it substitutes itself in relation to the physical thing in question in place of him who formerly bore the relation to that thing, which we denominate ownership. In other words, it deals with what lawyers term the individual's 'interest' in the thing in question. That interest may comprise the group of rights for which the shorthand term is 'a fee simple' or it may be the interest known as an 'estate or tenancy for years,' as in the present instance. The constitutional provision is addressed to every sort of interest the citizen may possess."⁴

The above excerpt from the General Motors case indicates that the Court is here concerned with the plantation's "relation to the physical thing, as the right to possess, use and dispose of it," that is, the plantation's interest "in the thing itself" and that is the "interest known as an 'estate or tenancy for years'."

The basic rule with respect to severance damages is well stated by the Circuit Court of Appeals, Third Circuit, in the Sharpe case⁵ in the following language:

"It is not denied that in rendering the 'just compensation' secured by the constitution of the United States to the citizen whose property is taken for public uses it is right and proper to include the damages in the shape of deterioration in value which will result to the residue of the tract from the occupation of the part so taken. In applying this rule, however, regard is had to the integrity of the tract as a unitary holding by the owner. The holding from which a part is taken for public uses must be of such a character as that its

⁴ United States v. General Motors Corporation, 323 U.S. 373, 89 L. Ed. 311 (1945).

⁵ Sharpe v. United States, 112 F. 893, 896 (1902).

integrity as an individual tract shall have been destroyed by the taking. Depreciation in the value of the residue of such a tract may properly be considered as allowable damages in adjusting the compensation to be given to the owner for the land taken. It is often difficult, when part of a tract is taken, to determine what is a distinct and independent tract; but the character of the holding, and the distinction between a residue of a tract whose integrity is destroyed by the taking and what are merely other parcels or holdings of the same owner, must be kept in mind in the practical application of the requirement to render just compensation for property taken for public uses. How it is applied must largely depend upon the facts of the particular case and the sound discretion of the court."

The evidence, as we shall hereafter point out to the Court, clearly shows that the properties remaining after the takings (excluding movable personal property) suffered a loss in value by reason of the takings. If so, how may such loss of value be proven?

"... 'Upon considering the record and the argument we find that the land taken is a part of a larger tract which at the time of the taking was used as a unit for a brick manufacturing plant and that the severance of the part taken did destroy the usefulness and value of the plant, so that what remained had the value only of disorganized land and buildings, and the machinery comprised in the plant had only the value of such second-hand property. The owner is entitled to be compensated not only for the separate value of the land taken, but also for the loss in value of the remainder of the tract in the use that was made of it at the time of the taking.

"There being no established market price, the fair value at the date of the taking of the whole plant, excluding personal property, ought to be ascertained, looking upon it as a plant organized for a business shown to be generally successful and having a good prospect; and also the fair value for sale of what was left afterward. The difference in the values is the just

compensation to be paid. That the plant was making money may be considered in fixing its value for sale, but the business is not to be valued as such, nor is any loss of future profits to be compensated. What the plant originally cost, what Stephenson Brick Company paid for it at judicial sale, it not having been a sheriff's sale, and what it would cost to reproduce the plant less a fair depreciation, may all be considered, but neither is to be taken as a fixed standard. The members of this court are not agreed on the value of all the items involved in the plant or in what is left of it, and we do not attempt to fix them separately. We do agree that the total compensation fixed by the three district judges is fair; and we find as our judgment of the value of the property condemned and as the just compensation due to be paid for the taking as of the date thereof, to-wit October 28, 1936, the sum of \$97,500'." (*Italics supplied.*)

Stephenson Brick Co. v. U. S. et al. CCA 5th Circuit, 110 Fed. 2nd 360, 361.

Decided March 15, 1940.

In *Baetjer v. United States*, 143 F. 2nd 391, the Court says:

"With these general considerations in mind we turn to the evidence on damages introduced by the appellants at the trial below, but stricken at the end of their evidence in chief. This evidence was to the effect that in the past the appellants had raised sugar cane on the lands on Vieques which the government has taken; that they had transported this cane to their mills on the main island of Puerto Rico for processing into sugar; and that, there being no other lands economically available upon which they could raise cane to keep their mills running at full capacity, they had suffered a loss to the extent of \$270,000 'in value of excess equipment.' The meaning of the phrase just quoted is not altogether clear. *If it means that after the taking the appellants' mills had an uneconomic over-capacity so that they could not be operated by the appellants as efficiently and therefore as profitably as before the taking, then the stricken evidence shows*

only a loss to business which resulted as an unintended incident of the taking and so a loss not compensable under the doctrine of Mitchell v. United States, supra. On the other hand, if it means, and there is other evidence tending to show that this is what the witness who used the phrase meant by it, that the over-capacity of the mills with respect to cane lands available to supply them has depreciated their value on the market to the extent of \$270,000, then the evidence would tend to show a compensable loss. In short the stricken evidence would indicate a compensable loss only if it means that after the taking the appellants' mills had an uneconomic over-capacity so that they could not be operated by anyone as efficiently and therefore as profitably as before the taking, this being a matter which a hypothetical willing buyer would consider in determining what he would pay for the property. The case must be remanded for the court below to consider the appellants' evidence, and the evidence which the government says it can introduce to contradict it, in order to determine whether or not the appellants have suffered a compensable loss, and, if they have, its extent." (Italics supplied.)

In Nichols on Eminent Domain, Vol. 2 Second Ed. Par. 236, P. 721, the author says:

"It is well settled that, where part of a tract of land is taken for the public use, the just compensation to which the owner is entitled by the constitution includes the damages to the remainder of the tract resulting from the taking as well as the value of the land taken. In other words, the 'just compensation' guaranteed by the constitution implies not merely the value of so much land separately from its connection with the whole tract, but the injury or loss to the whole estate caused by the taking from it the part which is so appropriated."

In the case of *Illinois Railway Company v. Humiston*, 208 Ill. 100 (69 N.E. 880), it appeared that a railroad condemned a strip of land for a right of way through a farm. There were buildings on a part of the farm, but the opinion

indicates that the strip taken was vacant land. The lower court instructed the jury to value the strip "as a part of the whole farm" and excluded evidence offered by the taker concerning the value of the farm without improvements. The taker on appeal alleged that the exclusion of the evidence was error, on the ground that the value of the part was merely its value as "a part of the farm without improvements."

The upper court in affirming the lower court said:

"Where the vacant land embraced in the farm was necessarily used and occupied in conjunction with the improvements thereon, and, by reason of so being used and occupied, had a value as an entirety over and above the value of the bare land, the owner of the land would have the right to the value of the part, sought to be taken, as used and occupied in connection with the whole farm. In other words, the strip of land sought to be taken for a right of way has a special value to the owner in connection with the whole of the farm with the improvements upon it, which is greater than the mere value of the bare land without the improvements."

The case of *Lineburg v. Sandven* (N.D.) 21 N.W. 2nd 808 is very much in point. This was an eminent domain proceeding arising out of the condemnation of lands for use as a public highway. The controversy here resulted from the taking of 21.88 acres of a farm containing 286.57 acres of land.

The District Court found the compensation to which the owner of the land was entitled was as follows:

Value of the 21.88 acres taken.....	\$ 590.76
Value of the fence.....	187.50
Damages to the remaining farm as a unit.....	2,443.59
Total Compensation	<u>\$3,221.85</u>

On appeal, the upper court sustained the findings made by the lower court except for the correction of an error made in the computation of the damages.

The principle stated by the lower court and accepted by the Supreme Court of North Dakota is well stated as follows:

“ ‘ . . . The compensation to which appellant is entitled is the difference between the actual market value of appellant's property considered as a whole at the date of the trial before the severance of the property condemned and the actual market value of the remainder of the property after the appropriation of that part condemned.’ ”

In answer to the contention of the appellant's counsel that in arriving at the value of the farm before the taking, only the value of the land should have been considered and that no consideration should have been given to the buildings thereon, the Court said that this contention could not be sustained and quoted as follows from Lewis on eminent domain:

“ ‘ . . . Ordinarily buildings are part of the land and when land is taken for public use the buildings and structures thereon are taken with it and the whole must be paid for.’ ”

The Court said further:

“ . . . The farm was established and had been maintained and operated as a single unit. The buildings are undeniably a part of the realty. The owner of the farm is entitled to be paid the value of the parcel of property which is taken and he is entitled to be paid the damages to the remainder of the farm that was not taken which result from the taking of the parcel and the construction thereon of the proposed highway. The parcel so remaining consists not only of the land but of the buildings thereon which are a part of the realty.”

Certainly in valuing the property of any enterprise the question of whether or not the combined properties produce a fair return on the capital invested is important. In other words, properties of a successful going concern when

considered as a whole are almost certain to have a greater value than the same properties of a concern which has been unsuccessful and must be liquidated.

A prospective purchaser considering the purchase of properties like those of the Honolulu Plantation Company would look into the history of the concern and the use made of its properties. He would consider whether the enterprise was successful or not as well as the future prospects of the enterprise.

As stated in the Stephenson Brick Company case, *supra*,

“There being no established market price, the fair value at the date of the taking of the whole plant, excluding personal property, ought to be ascertained, looking upon it as a plant organized for a business *shown to be generally successful and having a good prospect*; and also the fair value for sale of what was left afterward.” (Italics supplied.)

(110 Fed. 2nd 360,361.)

The evidence adduced by the Honolulu Plantation Company, on the trial of these consolidated cases, shows beyond any reasonable doubt that the Company sustained a compensable loss and is entitled to severance damages as a result of the takings.

It is the contention of cross-appellant herein that after the takings, the Plantation's mill, irrigation system and the plantation equipment in general had an uneconomic over-capacity with respect to the cane lands available to supply the enterprise, such that the Plantation could not be operated by anyone as efficiently as before the takings and that such over-capacity depreciated the value of the mill, the irrigation system and the other equipment and properties remaining after the takings. The market value of all of the real properties of the Company held before the takings and forming the integrated enterprise owned and conducted by said Company was far higher than the market value or the fair value of the real property of said integrated

unit remaining after the takings. The difference between those values is the amount the Company suffered in damages by reason of the severance.

It is submitted that the testimony given by several witnesses shows that an uneconomic over-capacity would depreciate the value of the remaining plantation properties as a unitary whole.

The testimony in this regard given by Mr. George L. Schmutz (R. p. 669 et seq.) may be considered first. The outstanding qualifications of Mr. Schmutz, from the standpoint of both training and experience, as an engineer, real estate broker, appraiser and as author and lecturer on appraisal work, considered together with his intimate knowledge of the properties taken in these proceedings, suggest that his opinions of value are entitled to great weight.

Mr. Schmutz valued all of the properties of the Honolulu Plantation Company prior to the takings, excluding movable personal properties and excluding growing crops, at \$4,200,000 (R. p. 686) and he valued the same properties with the same exclusions after the takings involved in these proceedings as of June 21, 1944, at \$3,113,000 (R. p. 687).

Mr. Schmutz said specifically that in his computations he did not ascribe any value to profits or good will of a going concern. Mr. Schmutz indicated that his opinion of value computed before and after the takings was based on a unit property value of \$1,000 per acre for irrigated cane land of a leasehold plantation (R. p. 687) and that he considered the total irrigated cane land area controlled by the Honolulu Plantation Company before the takings at 4,283 acres and that after the takings involved in these proceedings he considered the irrigated cane land controlled by the company at 3,196 acres. (R. p. 687.)

The witness testified that in arriving at a unit property value of \$1,000 per acre he considered several matters. Among other factors, he said that in discussing the matter of value with people in the community regarding the invest-

ment in irrigated cane lands per acre, he found that the common opinion in the community was that leasehold plantations without a refinery required the investment of about \$1,000 per acre in irrigated cane lands and the properties serving them (R. p. 688). The witness testified further that he had made a study showing the amount of depreciation and the value of the property from 1939 to the present for the purpose of determining the shrinkage in value occasioned by the taking of considerably more acres than are involved in the present proceedings to get some indication of the amount of depreciation on the average suffered by the loss of each acre (R. p. 688). Mr. Schmutz indicated also that he had made a study of a report prepared by a qualified technician in Honolulu concerning the damage caused by prior takings for the purpose of understanding his views, his method of approach and his conclusion. The witness said that as a result of these studies and investigations, he arrived at a conclusion that the value of the physical property depreciated at the rate of about \$1,000 per acre for each acre that was lost by virtue of the takings. (R. p. 688.)

Mr. Schmutz testified further that on the basis of the published annual reports of the company, the output of the mill was approximately 20,000 tons prior to the takings and about 15,000 tons after the takings. (R. p. 689.) It was his opinion that the decrease in the output of the mill would depreciate the value of the mill property not only because of the resulting over-capacity but also because of the further fact there would be an increase in production cost so that the mill could not be operated as efficiently and, therefore, as profitably as before the taking. (R. p. 689.)

The witness indicated that in arriving at his opinion of value he considered the fact that there was no land available for replacement of cane growing areas lost to the Government in these proceedings. He said that if there had

been land available for replacement, the damage would have been less. (R. p. 690.) He testified that he also considered the fact that in 1936 the Company renewed or extended most of its major leases to the year 1965. (R. p. 678.)

It was further pointed out that if there had been a free market for raw sugar and if the same could be purchased in the market in the future to take the place of plantation grown cane, the damage would have been less. (R. p. 691.)

Mr. Charles Campbell Crozier, Deputy Tax Commissioner of the Territory, testified as an expert witness for the Company. (R. p. 835 et seq.)

Mr. Crozier indicated that in his capacity as a tax official and as an appraiser for the Government in a number of its takings, he had studied the Honolulu Plantation Company to a considerable extent. (R. p. 852.)

Mr. Crozier was asked to assume that on June 21, 1944, the Honolulu Plantation Company had approximately 4,400 acres of cane land and that on that date 1,087.590 acres of cane land were taken from it, and to express his opinion as to the fair value of all of the properties of the plantation before and after the takings, excluding movable personalty and growing crops, taking into consideration his knowledge of the plantation, its holdings and the manner in which it was held. (R. p. 870.) The witness said that in his opinion there would be a diminishing value before and after the takings of approximately 20% or about a million dollars. (R. p. 871.)

The witness based his opinion of value on the theory that a plantation of 4,400 acres was an enterprise of certain characteristics and that as the lands comprising the 1,087 acres were taken, there was a diminishing value. The witness said that as of June 21, 1944, a plantation of 4,400 acres would possess a certain value, which the witness set at about \$4,000,000. He testified that as of June 22, the day after the takings, by use of the so-called "thousand-dollars-

an-acre rule," the value of the plantation would be about \$3,000,000. (R. p. 873.)

Witness explained the "thousand-dollars-an-acre rule" as one of the methods developed to estimate the capital or investment required for a 25 or 30 thousand ton leasehold plantation to operate and produce sugar. (R. p. 873.)

The testimony of Mr. S. L. Austin (R. p. 526 et seq.) and Mr. Spalding (R. p. 1040 et seq.), testifying as officers of the Honolulu Plantation Company, substantiates to a very large degree the testimony given by Mr. Schmutz and Mr. Crozier.

Mr. S. L. Austin's opinion of the value of the plantation, excluding movable personalty and growing crops before the takings involved in these proceedings, was \$4,300,000 and his opinion of the value of the plantation excluding the same items after the takings was \$3,300,000. (R. p. 582, 583.)

Mr. Schmutz, Mr. S. L. Austin and Mr. Crozier all testified that prior to the takings, the output of the mill was in excess of 20,000 tons and that the output of the mill after the takings was and could only be about 15,000 tons. All three witnesses expressed the opinion that the decrease in the output of the mill would depreciate the value of the mill property because of the resulting uneconomic over-capacity.

All three of the witnesses testified that in arriving at their opinions of value they considered the fact that there was no suitable land available for the replacement of cane growing area lost to the Government. All three of the witnesses testified that in their judgment the value of the remaining physical property depreciated at the rate of about \$1,000 per acre for each acre of cane land which was lost as a result of the takings. All three of the witnesses testified that they did not ascribe any value to potential profits or the good will of a going concern.

It is respectfully submitted that the factors considered by the Company's witnesses were properly considered and that the testimony shows conclusively that after the takings involved in these proceedings the Company's mill, irrigation system and other nonmovable physical properties had an uneconomic over-capacity so that they could not be operated by the Company or by anyone else as efficiently and as profitably as before the taking.

Witnesses for the Company considered and they had a right to consider that the plantation was organized to conduct a business which had been generally successful and which possessed a good prospect. The factors considered by the witnesses in arriving at the value of the plantation before and after the takings, such as the dividends record of the Company, the renewal or extension in 1936 of most of its major leases, the amount of money spent by the Company in capital improvements and betterments, the book value of the Company, the earnings of the property during the years prior to the takings were proper elements to be considered. It is admitted that the witnesses for the Company did not attempt to fix separately the value of all or any of the items considered in arriving at their opinions. However, they did reach substantial agreement on the difference in value of the plantation before and after the takings. Mr. Schmutz' opinion of the value before the taking was \$4,400,000 and his opinion of value after the taking was \$3,113,000 or a difference of \$1,287,000. (R. p. 686, 687.) Mr. Austin's opinion of value before the taking was \$4,300,000 and his opinion of value after the taking was \$3,300,000 or a difference of \$1,000,000. (R. p. 584.) Mr. Crozier's opinions were substantially the same as Mr. Austin's.

The opinions of the Company's witnesses as to the value of the plantation's properties before and after the takings indicate that the value of the property remaining after the takings decreased in value at the rate of \$1,000 an acre for

each acre of cane land taken. The trial court made a finding to that effect in the following language: "... I am satisfied by the evidence that the Company has proven its claim that its remaining property decreased in value at the rate of \$1,000 an acre for each cane acre taken." (R. p. 491.)

As has been pointed out above, the trial court awarded damages upon the basis of \$1,000 per acre for 440.175 acres, or a total of \$440,175. The court did not award severance damages in connection with the 595.01 acres of lands held under the Damon title on the theory that the Company did not have an estate or interest in those lands which would entitle it to compensation in these proceedings.

In view of the fact that the Government did not present any evidence on the issue of severance damages, the testimony of the Company's witnesses that the value of the remaining physical property depreciated at the rate of \$1,000 per acre for each acre of cane land taken in these proceeding should be accepted by this court as indicating the proper measure of severance damages in this proceeding.

CONCLUSION

Accordingly, it is submitted to the court that the Honolulu Plantation Company by virtue of its estate and interest in the Damon lands is entitled on this cross-appeal to judgment in the amount of \$595,010, in addition to the amount of \$494,748.00 awarded by the lower court.

Dated at Honolulu, T. H., this 12th day of March, 1949.

C. NILS TAVARES

VERNON O. BORTZ

Alexander & Baldwin Building
Honolulu, T. H.

Attorneys for
Honolulu Plantation Company
Appellant.

Of Counsel:

PRATT, TAVARES & CASSIDY



No. 12,023

In the United States Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

HONOLULU PLANTATION COMPANY, APPELLEE

and

HONOLULU PLANTATION COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

UPON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

BRIEF FOR THE UNITED STATES, APPELLEE

A. DEVITT VANECH,

Assistant Attorney General.

JOHN F. COTTER,

GEORGE S. SWARTH,

*Attorneys, Department of Justice,
Washington, D. C.*

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PAUL M. O'BRIEN



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**In the United States Court of Appeals
for the Ninth Circuit**

No. 12,023

UNITED STATES OF AMERICA, APPELLANT

v.

HONOLULU PLANTATION COMPANY, APPELLEE

and

HONOLULU PLANTATION COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

*UPON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII*

BRIEF FOR THE UNITED STATES, APPELLEE

OPINION BELOW

The opinion of the district court (R. 461-504) is reported at 72 F. Supp. 903.

JURISDICTION

This is an appeal from a judgment entered November 5, 1947 (R. 504-507), on consolidated trial of thirteen proceedings in eminent domain brought by the United States. The Honolulu Plantation Company filed its

notice of appeal February 3, 1948 (R. 509). Jurisdiction of the district court was invoked under section 201 of the Act of March 27, 1942, 56 Stat. 176, 177 (R. 11, 37, 71, 91, 110, 195, 201, 226, 298, 324, 355, 372, 398). Jurisdiction of this Court is invoked under 28 U. S. C. sec. 1291.

QUESTIONS PRESENTED

1. Whether the district court erred in holding that negotiations between appellant and the Trustees of the Damon Estate, owner of 595.01 acres of the land condemned by the United States, had not given appellant such an interest in the 595.01 acres as to entitle it to recover severance damages for asserted diminution in value of its remaining property due to the condemnation.

2. Whether the district court erred in refusing to award appellant \$595,010 severance damages on account of condemnation by the United States of 595.01 acres of land owned by the Damon Estate.

STATEMENT

Between June 21, 1944, and December 6, 1945, the United States filed thirteen proceedings, subsequently consolidated (R. 5-9), to condemn a total of 1,896.184 acres of land, including 1,087.59 of the 4,300 acres of cane land embraced in the plantation of appellant Honolulu Plantation Company (R. 552, 586, 1300). Appellant owned in fee 2.912 acres of the land taken (R. 638-639, 1537). The remainder was occupied by it under various leases or other arrangements. Appellant's only claim on account of the taking of land occupied but not owned by it is a claim for severance damages for asserted resulting diminution in the value of the untaken remainder of its plantation. The trial court allowed severance damages based on the taking of 440.175 acres (R. 504), and the United States has

appealed from that judgment (R. 508). The Honolulu Plantation Company appeals from the refusal of the trial court to allow severance damages on account of the taking of an additional 595.01 acres occupied by appellant and owned by the Damon Estate (R. 509).

This land was part of 1,451.66 acres leased to appellant by the Trustees of the Damon Estate, under date of June 27, 1927, for a term of fifteen years beginning January 1, 1929, and ending December 31, 1943 (R. 1516-1533). That lease expired before the first of the present condemnation suits was begun on June 21, 1944 (R. 10-23). However, before its expiration there was an exchange of letters between the Trustees and C. Brewer & Co., appellant's agent (R. 1098-1099), looking toward execution of a new lease; and appellant relies on those letters as in themselves constituting either a new lease or a binding contract to make a lease. The first letter was from the Trustees to C. Brewer & Co. on October 18, 1940 (Ex. 9K, R. 1513-1515):

The Trustees of the S. M. Damon Estate are willing to lease to the Honolulu Plantation Company for a term of ten years from the expiration of the present lease, or until December 31, 1953, unless there is an earlier determination of the Trust, the areas as set forth under the terms and conditions specified below:

Land to be leased comprising fields now in cane mauka [on the landward side] of Kamehameha Highway and makai [on the seaward side] of the Highway fields 92 to 94 inclusive. (We understand fields 95 and 96 are going to be taken over by the U. S. Army.) Lease of fields 91 and 107 not to be renewed and these lands to revert to the Estate at the termination of the present lease on December 31, 1943. Fields 97-A and 97-B, known as the "Gore Lot," to be surrendered to the Estate without cost when the present cane growing on said land is harvested.

The minimum rental to be \$15.00 per acre for lands occupied for plantation purposes. Said rental to increase at the rate of 20¢ per acre per annum for any increase of \$1.00 in the average price of 96° New York raws about [above] \$50.00, and proportionately for any fraction of an increase of \$1.00, said increase, however, to cease when the price of 96° raws exceeds \$100.00.

The Plantation to pay the property taxes.

If the present Sugar Act is to continue in its present or a similar form, 75% of the Federal payments to be added to the New York basis price to determine the average price of 96° raw sugars which fixes the rental value basis.

All areas not in sugar cane and not used for ditches or railroads may be withdrawn by the Estate's giving sixty days' notice, without penalty to the Estate, including any reduction in rent.

The Damon Estate to have an easement over the roads so as to give proper ingress and egress to the lands mauka of fields 82 to 89, also to have the privilege of laying water pipes along such roads at such times as the fields have just been harvested in order not to interfere with plantation operations.

If these terms are agreeable a formal lease can then be drawn up.

To this, P. E. Spalding, vice-president of C. Brewer & Co., replied on October 21, 1940 (Ex. 9K, R. 1515-1516):

We have for acknowledgment your letter of October 18, 1940 containing an offer to lease to the Honolulu Plantation Company certain lands of the Estate of S. M. Damon for a period of ten years commencing January 1, 1944 and terminating December 31, 1953 and under certain conditions.

The terms of your offer are acceptable to Honolulu Plantation Company. We understand that unless Fields 95 and 96, makai of Kamehameha Highway, are taken over by some Federal authority before the expiration of the current lease, they will

be included in the lands to be leased to Honolulu Plantation Company.

We will prepare a tentative form of lease for submission to you.

Following that exchange, which forms the basis for appellant's contention, C. Brewer & Co. wrote to the Trustees on November 29, 1940 (Ex. A, R. 1567-1568):

Proposed New Lease of Moanalua Lands to
Honolulu Plantation Company

In further reply to your favor of October 18, 1940, we now indicate that a tentative form of lease has been drawn up by us and same is submitted to you, herewith.

No effort has been made to describe the areas to be leased as these will have to be prepared by some surveyor who has complete data, but said description should, of course, include the fields mentioned in your favor and certain adjacent land that is now held under the existing lease, except the areas recently condemned.

It may be well to fix the aggregate minimum rental figure with definiteness when the form of lease is finally accepted.

We will be glad to prepare the form of new lease in a permanent way if you will furnish us with a description of the land to be demised and will also indicate your approval of the form of said new lease as submitted, or state what changes you desire to have made therein.

The tentative form of lease (Ex. B, R. 1568-1577) followed in general the terms of the lease of June 27, 1927 (R. 1516-1533), with some modifications to conform to the Trustees' letter of October 18, 1940. It also contained provisions not found in either. Thus, it provided for a holdover rental of \$15.00 per acre per annum (R. 1570), which was neither the former holdover rate of \$23.50 (R. 1523) nor the new regular rental of \$15.00

plus contingent increases (R. 1571). The Trustees' letter called for rental to be computed according to the number of acres "occupied for plantation purposes" (R. 1514), but the tentative draft confined its rental basis to land "cultivated in cane" (R. 1571).¹ The tentative draft introduced a provision giving the lessee up to 30 days beyond the end of the calendar year for payment of increases in rent above the yearly minimum of \$15.00 per acre (R. 1572). It also added a new qualification to the lessee's obligation to pay taxes and assessments, that the lessor should not, without consent of the lessee, take action to create liability on the lessee for permanent benefits; and it provided that the lessee could withdraw from the lease as to any land on which the taxes might equal or exceed the rent (R. 1574).

After another but immaterial exchange between the parties (Ex. C, R. 1578-1579; Ex. D, R. 1580), the Trustees on August 15, 1941, wrote to C. Brewer & Co. as follows (Ex. E, R. 1581-1583):

Due to our inability now to lease to the Honolulu Plantation Company certain areas at Moanalua, and your inability to deliver certain areas as a result of the recent federal condemnation proceedings, the Trustees under the Will of Samuel M. Damon now propose to lease for a period of ten years from the expiration of the present lease, or until December 31, 1953, unless there is an earlier determination of the Trust, the following areas, subject to the following terms, conditions and rights of withdrawal:

The land to be leased to comprise fields 82-89 inclusive, except a strip approximately 250 feet deep just mauka of Kamehameha Highway along the

¹ The lease of June 27, 1927, was of 1,451.66 acres, of which only 1,223.91 acres were cane land (R. 1526). According to H. P. Ex. 6 (R. 1300-1303), the present suit took 658.317 acres of Damon Estate land occupied by appellant, of which only 595.01 acres were cane land.

entire makai end of field 83, which shall be surrendered at once from the present lease, the plantation railroad to be moved mauka of this strip; excepting also a portion of fields 88 and 89 to a point opposite "E" Road; the lessors to have the right to withdraw, upon eighteen months' written notice, the remaining area of field 83 prior to December 31, 1945; fields 86, 88 and the remaining portion of 89 up to a point opposite John Rodgers Airport Road, prior to December 31, 1948; and all of field 84 mauka of the ditch, prior to December 31, 1950.

It will be noted that no land makai of Kamehameha Highway is to be included in the proposed new lease.

The minimum rental to be 15 per acre for lands occupied for plantation purposes. Said rental to increase at the rate of 20¢ per acre per annum for for any increase of \$1.00 in the average price of 96° New York raws above \$50, and proportionately for any fraction of an increase of \$1.00, said increase, however, to cease when the price of 96° raws exceeds \$100. * * *

The lease to include a condemnation clause, hunting and trespassing clause, and strip and waste clause, in form satisfactory to us, together with such other provisions as shall be deemed proper.

We do not concur in some of the provisions which were contained in your former tentative draft, namely, the provision that in case the lessee continues to occupy after the termination of the lease in order to harvest crops the rent be at the fixed rate of \$15 per acre, instead of at the rate hereinabove mentioned; and the clause on page 5 giving the lessee the option to withdraw certain areas. We think that the covenant on page 6 with reference to cultivation and rights of way would be unnecessary. The surrender clause at the bottom of page 6 should provide that in case buildings

² Here were repeated without change certain terms proposed by the Trustees' letter of October 18, 1940 (pp. 3-4, *supra*).

shall be removed the lessee shall restore the surface of the land to its original condition.

If these terms are agreeable, please signify acceptance in writing at your earliest convenience, and we will submit a formal draft of lease for your acceptance.

C. Brewer & Co. rejected the proposal (Ex. 18, R. 1541-1542). It said:

Your specific offer of October 18, 1940 and our unconditional acceptance of October 21, 1940 constituted a binding agreement which could only be altered by mutual consent. You are therefore advised that your supplementary offer of August 15, 1941 is rejected and that Honolulu Plantation Company will adhere to its full rights as established by the existing agreement.³

After its lease expired on December 31, 1943, appellant continued until 1946 to occupy so much of the Damon Estate property as was not taken by federal condemnations (see R. 498), being billed for and paying rent at the rate provided by the Trustees' letter of October 18, 1940 (R. 1201-1202). The first of the present suits was filed June 21, 1944 (R. 10-23), and that is to be deemed the date of taking for all thirteen suits (R. 459-460, 462, 499).

³ On September 16 and again on November 11, 1943, Charles H. Merriam, writing on behalf of C. Brewer & Co. in answer to inquiries from the Navy Department regarding leasing some of these lands, suggested that the Department should deal with the Trustees of the Damon Estate. His second letter explained that "Honolulu Plantation Company's tenancy expires on these areas on December 31, 1943" (Govt. Ex. 9 for identification, see R. 1126, admitted at R. 1261 as Ex. H, R. 1588-1589; Govt. Ex. 8 for identification, see R. 1122, admitted at R. 1261 as Ex. G, R. 1586-1587). Mr. Spalding testified that those letters were written without his knowledge, and that Mr. Merriam was failing mentally at the time, although the company attempted to conceal that fact from the public and kept him in his position as manager of its real estate department until the summer of 1944 (R. 1122-1128, 1183-1186, 1205-1207).

On the foregoing facts, the district court held that the correspondence between appellant's agent and the Trustees of the Damon Estate was not intended by them as a new lease; that after December 31, 1943, appellant was at best a tenant from year to year with a right to secure a lease; and that at the date of taking appellant did not have such an interest in the lands of the Damon Estate as to support its claim for severance damages (R. 499-503).

SUMMARY OF ARGUMENT

1. Appellant Honolulu Plantation Company did not have a leasehold estate in the 595.01 acres at the time of the taking. Whether correspondence, in itself, constitutes a lease depends on the intent of the parties. Here, the language used by appellant and the Trustees of the Damon Estate, their expressed intent to draw up a formal lease, their subsequent conduct and the surrounding circumstances all indicate that they did not intend their correspondence to constitute a lease.

2. Appellant did not have a binding contract to receive a lease from the Trustees of the Damon Estate. Their correspondence was no more than negotiation, and in any event appellant's letter relied on as an acceptance did not conform to the Trustees' proposal.

3. Even if appellant had a legally binding contract for a lease, its silence as to material terms of the proposed lease made it too indefinite to be capable of specific enforcement. Consequently, appellant had no equitable estate in the 595.01 acres, and as to it the condemnation was at most a noncompensable frustration of a contract and not a compensable taking of property.

4. Whatever appellant's rights in the 595.01 acres might ultimately have been determined to be, at the time of the taking those rights were so dubious that they did not enhance the market value of appellant's re-

maining property. Therefore the condemnation of the 595.01 acres did not diminish the market value of appellant's remaining property, and appellant is not entitled to severance damages.

ARGUMENT

I

Appellant Did Not Have a Lease of the 595.01 Acres Owned by the Damon Estate

Appellant asserts (Br. 9-13) that the letter of October 18, 1940, from the Trustees of the Damon Estate (pp. 3-4, *supra*), and the reply of C. Brewer & Co., appellant's agent, on October 21, 1940 (pp. 4-5, *supra*), amounted to a lease to appellant, for ten years beginning January 1, 1944, covering the lands here in question. The district court correctly held to the contrary (R. 499-502).

It is the intent of the parties which determines whether a particular instrument or series of instruments is a lease. An agreement is a lease if it "leaves nothing to be done and gives the lessee an immediate right of possession". 3 Thompson, Real Property (1940) 293; *Larrisch v. Schaefer*, 6 Hawaii 140, 142-143 (1875), quoting 1 Washburn, Real Property, 300 and 4 Kent, Commentaries, 108. However, "If the contracting parties manifest an intention of executing, subsequently, a formal lease with covenants, the agreement to lease is not a completed lease." *Dan Cohen Realty Co. v. National Savings & Trust Co.*, 125 F. 2d 288, 289 (C. C. A. 6, 1942).

Here, the Trustees wrote that they were "willing to lease" etc., and "If these terms are agreeable a formal lease can then be drawn up" (pp. 3-4, *supra*). Appellant's agent replied, "The terms of your offer are acceptable," referred to certain lands which it understood "will be included in the lands to be leased," and

concluded, "We will prepare a tentative form of lease for submission to you" (pp. 4-5, *supra*). Thus, there were no words of present demise; on the contrary, both parties spoke of the leasing in future terms, and execution of a formal lease was expressly contemplated. Since appellant was already in possession under its prior lease which still had more than three years to run, there was no need for a stop-gap lease in the form of correspondence until a formal instrument could be executed. In the ordinary course the parties would have expected to be able to settle all the terms and execute the new lease long before expiration of the old one.

In the light of the foregoing considerations, it is plain that the trial court was right in holding that the letters of October 18 and 21, 1940, did not constitute a lease.

II

The Correspondence Between Appellant's Agent and the Trustees of the Damon Estate Was Mere Negotiation and Not a Contract

Alternatively to its claim of a lease, appellant contends (Br. 9, 13-23) that the correspondence above referred to constituted an offer and acceptance, creating a binding contract to make a lease. That contention is equally unsound. The letter from the Trustees expressed a willingness to enter into negotiations which might result in a lease. Such a communication is not an offer to contract and cannot be "accepted". No matter how answered, it does not bind the putative lessor. This was the holding in *Elkhorn-Hazard Coal Co. v. Kentucky River Coal Corporation*, 20 F. 2d 67 (C. C. A. 6, 1927). The material facts of that case were indistinguishable from those at bar. There the lessor wrote that it "would be willing to make a lease to your company" of certain land at specified rentals, the lessee

to pay all taxes, concluding, "If this meets with your approval, Mr. W. O. Davis, our general counsel, on his return to this office, will draw up a lease for your signatures according to the above terms." The addressee replied that it "accepts offer as proposed in the letter aforesaid, and requests that your company draw up its customary lease as your company makes to other persons under similar circumstances." The district court held that there was neither a lease nor a binding contract for a lease. The appellate court affirmed, saying (pp. 69-70):

* * * The offer must be one which is intended of itself to create contractual relations upon its acceptance. See 6 R. C. L. § 23, p. 600. The letter is not in form an offer. It merely says that the writer "would be willing to make a lease." Its last paragraph calls for a communication to the writer of an approval, and repels the idea that a contract would result by merely mailing an acceptance. It states that, after receipt of that approval, a lease would be drawn up and executed. It was clearly not intended to create contractual relations merely by mailing an acceptance.

Furthermore, we think the letter, in view of the circumstances, indicates that the preparation and execution of the lease were necessary to the creation of a contract. The letter treats of only a few of the terms which would ordinarily be embodied in a mining lease. * * *

* * * A written lease was contemplated as a final conclusion of the negotiations. The terms of the letter so indicate. As already said, it is not in form an offer to contract, but merely an expression of a willingness to make a lease. It calls for a previous expression of approval, without which no lease is to be prepared and executed. The subject-matter is of a nature to require a formal writing for its full expression. It is of that class which is usually put in writing. The letter treats of only a few of the terms of the usual lease. * * *

Numerous authorities to the same effect were cited by the court (20 F. 2d at p. 70), including the decision of this Court in *Northwestern Lumber Co. v. Grays Harbor & P. S. Ry. Co.*, 221 Fed. 807 (1915); and *Hackley v. Oakford*, 98 Fed. 781 (C. C. A. 3, 1899), certiorari denied 177 U. S. 694.

Moreover, it is apparent that the parties themselves understood they were merely negotiating for a lease. A comparison with the numerous provisions of the prior lease (R. 1516-1533) and the tentative draft for the new lease submitted by appellant (R. 1568-1577) makes plain that the letters of October 1940 contained only a few of the material terms that the parties would incorporate into any such lease. For example, no reference was made to rights of way for the lessee (cf. R. 1526-1527, 1569-1570), manner of payment of rent (cf. R. 1528, 1571-1572), holding over to harvest maturing crops (cf. R. 1528, 1570), payment of special assessments and benefit charges (cf. R. 1529-1530, 1573-1574), fencing and liability for damage by straying cattle of the lessor or its other tenants (cf. R. 1530, 1574), exercise by the lessee of rights over other parts of the Ahupuaa of Moanalua (cf. R. 1531, 1575, 1583), maintenance of improvements (cf. R. 1531, 1575), removal of buildings and machinery by the tenant on termination of the lease (cf. R. 1532, 1576, 1583), or right of the tenant to withdraw from parts of the area leased (cf. R. 1574, 1583). As to some of these, the parties proved to be in material disagreement (R. 1583).

It is unlikely, to say the least, that the parties intended to commit themselves to an arrangement that left so much in doubt. As the court said in *Locomobile Co. of America v. Bergdoll*, 192 Fed. 447, 448 (C. C. E. D. Pa. 1912), "If the writings in evidence were intended to contain the whole contract, the parties were inevitably beginning a series of lawsuits, and it can

to pay all taxes, concluding, "If this meets with your approval, Mr. W. O. Davis, our general counsel, on his return to this office, will draw up a lease for your signatures according to the above terms." The addressee replied that it "accepts offer as proposed in the letter aforesaid, and requests that your company draw up its customary lease as your company makes to other persons under similar circumstances." The district court held that there was neither a lease nor a binding contract for a lease. The appellate court affirmed, saying (pp. 69-70):

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It is unlikely, to say the least, that the parties intended to commit themselves to an arrangement that left so much in doubt. As the court said in *Locomobile Co. of America v. Bergdoll*, 192 Fed. 447, 448 (C. C. E. D. Pa. 1912), "If the writings in evidence were intended to contain the whole contract, the parties were inevitably beginning a series of lawsuits, and it can

hardly be supposed that two thoroughly competent businessmen could have failed to know that many other matters must be discussed and agreed upon before their preliminary understanding could possibly be carried out."

There is nothing to the contrary in *Wong Kwai v. Dominis*, 13 Hawaii 471 (1901), relied on by appellant (Br. 12; cf. R. 499-500). There, as the decision put it, the lessor's agent "wrote definitely as one having complete authority, stating that the plaintiff, if he agreed, should have the lease on such and such terms" (13 Hawaii, p. 476). Nevertheless, the court said, "This is a case of unusual difficulty" (p. 474), and "The question of greatest difficulty is whether the letter should be construed as containing an offer" (p. 475). After examining all the circumstances and noting that the agent who wrote the letter had subsequently treated it as an offer and the acceptance as making a binding contract, the court concluded, "On the whole we are of the opinion that sufficient cause has not been shown for reversing the decree of the Circuit Judge" (p. 478). The decision seems to mark the limit of how far the Hawaiian court would go in sustaining a finding that such a contract to lease was intended by the parties. It provides no reason for reversing the present judgment, where the Trustees' letter was far less specific and their subsequent conduct was inconsistent with a view that they had made an offer capable of being accepted so as to make a binding contract. Cf. *Northwestern Lumber Co. v. Grays Harbor & P. S. Ry. Co.*, 221 Fed. 807, 814 (C. C. A. 9, 1915).

Finally, whatever view is taken of the Trustees' letter, no contract in fact resulted, because the reply by appellant's agent did not conform to the terms thereof. The Trustees wrote, "Land to be leased comprising fields now in cane mauka of Kamehameha Highway and

makai of the Highway fields 92 to 94 inclusive. (We understand fields 95 and 96 are going to be taken over by the U. S. Army.)” (R. 1513.) C. Brewer & Co. replied, “We understand that unless Fields 95 and 96, makai of Kamehameha Highway, are taken over by some Federal authority before the expiration of the current lease, they will be included in the lands to be leased to Honolulu Plantation Company” (R. 1515-1516). However, the Trustees had certainly not offered to lease fields 95 and 96. Their statement regarding those fields was at the most an explanation of why they were *not* being offered. In undertaking to increase the area covered by the negotiations, C. Brewer & Co. introduced a new provision, which prevented their letter from operating as an acceptance. *Iselin v. United States*, 271 U. S. 136, 139 (1926); *Title Insurance & Guaranty Co. v. Hart*, 160 F. 2d 961, 963, 966 (C. C. A. 9, 1947); *Machine Tool & Equip. Corp. v. Reconstruction Fi. Corp.*, 131 F. 2d 547, 556 (C. C. A. 9, 1942); *Richards v. Ontai*, 19 Hawaii 451, 456-457 (1909).

Since it thus appears that the Trustees’ letter was not an offer, and the reply to it was not an acceptance, it is obvious that no binding contract resulted from them.

III

As to Appellant, Condemnation of the Damon Estate Lands Was at Most a Frustration Rather Than a Taking

Appellant argues (Br. 13-23) that if the correspondence with the Trustees of the Damon Estate constituted a contract to lease, rather than an executed lease, still that contract would give it such an interest in the land as to entitle it to claim severance damages on account of the condemnation. Again, appellant’s conclusion is unsound.

Even if the supposed contract to enter into a lease were executed and legally binding, still it was silent as

to so many material terms of the proposed lease that it could not have been specifically enforced (cf. p. 13, *supra*), and the only remedy for breach would have been an action at law for damages. Cf. *Gulbenkian v. Gulbenkian*, 147 F. 2d 173, 175 (C. C. A. 2, 1945). The rule that the holder of a contract to purchase land has an equitable interest in the land, and related equitable principles, "are only incidents or necessary consequences of the right to specific performance." *National Bank of Kentucky v. Louisville Trust Co.*, 67 F. 2d 97, 100 (C. C. A. 6, 1933), certiorari denied 291 U. S. 665. Lacking the right to specific performance, appellant could have had at most only a right *in personam* against the Trustees of the Damon Estate, not an interest in the land itself. Cf. *Sutton v. Commissioner of Internal Revenue*, 95 F. 2d 845, 849 (C. C. A. 10, 1938). Mere frustration of a contract to purchase, by condemnation of the subject matter, is not a taking of property of the prospective purchaser and does not entitle him to compensation in the condemnation proceeding. *Omnia Co. v. United States*, 261 U. S. 502 (1923).

IV

Appellant Did Not Establish That Condemnation of These Lands Diminished the Market Value of the Remainder of Its Plantation

Since the only claim here made by appellant is for severance damages to the remainder of its plantation (R. 509), it would not have been enough for appellant to show that it had an interest in the 595.01 acres condemned. To recover severance damages, appellant needed also to show that the market value of its remaining property was diminished by the taking of its interest in the 595.01 acres. See *United States v. Miller*, 317 U. S. 369, 376 (1943), and cases there cited. That appellant failed to do. The trial court, giving appel-

lant the benefit of every doubt as to its legal rights, still held that it had not proved its case. It held (R. 502-503):

At best, having remained in possession after December 31, 1943, and thereafter having paid the yearly rent called for by the October 1940 contract, the Company had a year to year tenancy, with a right to sue for specific performance. An estate in that indefinite condition, involving the purchase of a lawsuit, would not be attractive to a buyer.

For these reasons, I do not believe that the Company had an estate in the Damon lands which supports its claim for severance damage with respect thereto at the rate of \$1,000 per acre.

The trial court's conclusion in this regard rests on its evaluation of the evidence, not ordinarily subject to review on appeal. However, it may be observed that no different conclusion could reasonably have been reached. Appellant's claim is that it suffered severance damages from the taking of this land at the rate of \$1,000.00 for each acre taken, the same rate as was claimed for the taking of lands as to which its legal status as lessee was unquestioned. The trial judge was obviously right in holding that the loss of a dubious right, enforceable only by litigation if at all, could not be as damaging as the loss of clearly established rights. He therefore rejected, as to the 595.01 acres, the uniform figure of \$1,000.00 per acre taken, advanced by appellant. Since there was no evidence as to any lesser amount of damage (cf. R. 503), appellant's case necessarily failed for lack of any credible evidence to sustain its burden of proving the damage claimed. See *United States v. Katz Drug Co.*, 150 F. 2d 681, 686 (C. C. A. 8, 1945); *United States v. Harrell*, 133 F. 2d 504, 507-508 (C. C. A. 8, 1943); *United States v. 711.57 Acres of L. in Eden Tp., Alameda County, Cal.*, 51 F. Supp. 30, 33

(N. D. Cal. 1943), appeal dismissed by stipulation 144 F. 2d 355 (C. C. A. 9, 1944).

Wholly aside from any of the matters above discussed, the reasons advanced by the United States, in its opening brief on its own appeal, for reversing the award of such severance damages as were allowed to appellant, are of course equally applicable to defeat the claim for further severance damages which appellant makes here.

CONCLUSION

For the foregoing reasons, it is submitted that the judgment appealed from should be affirmed in so far as it denies to appellant severance damages on account of the taking of the 595.01 acres of land owned by the Damon Estate.

Respectfully,

A. DEVITT VANECH,
Assistant Attorney General.

JOHN F. COTTER,
GEORGE S. SWARTH,
Attorneys, Department of Justice,
Washington, D. C.

APRIL 1949.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

vs.

HONOLULU PLANTATION COMPANY,
Appellee,

and

HONOLULU PLANTATION COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

REPLY BRIEF FOR HONOLULU PLANTATION COMPANY, APPELLANT

On Appeal from the United States District Court
For the District of Hawaii

C. NILS TAVARES

VERNON O. BORTZ

Attorneys for Appellant

Honolulu Plantation Company

Of Counsel:

PRATT, TAVARES & CASSIDY

Alexander & Baldwin Bldg.

Honolulu, T. H.

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IN THE
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vs.	
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UNITED STATES OF AMERICA,	

Appellant,
Appellee,
Appellant,
Appellee.

**REPLY BRIEF FOR
HONOLULU PLANTATION COMPANY,
APPELLANT**

**On Appeal from the United States District Court
For the District of Hawaii**

QUESTIONS INVOLVED

1. Does the Honolulu Plantation Company have such a property interest in the land held by it under those certain agreements executed by and between the Trustees of the Damon Estate and said Company as to entitle the latter to just compensation by way of severance damages under the Fifth Amendment of the Constitution of the United States?

2. Is the Honolulu Plantation Company entitled to just compensation in the amount of \$595,010 for severance damages suffered by it through the taking of its property interest in 595.01 acres of cane land held by it under those certain agreements executed by and between the Trustees of the Damon Estate and said Company?

SUMMARY OF ARGUMENT

1. Where real property is condemned by the sovereign, a person other than the owner of the fee is entitled to compensation if he possesses an "interest" or "estate" in the land. By virtue of those certain agreements executed by and between the Honolulu Plantation Company and the Trustees of the Damon Estate, the Honolulu Plantation Company held a lease, or in the alternative, an agreement to lease in connection with the Damon lands and thus owned such a property interest in said lands as to entitle it to just compensation.

2. Where a part of a tract of land is taken for public use, the just compensation to which the owner of an interest therein is entitled includes the damages to the remainder of the tract resulting from the taking, in addition to the value of the land taken. As a result of the takings in these proceedings, the physical properties of the Honolulu Plantation Company remaining after the takings were depreciated in value because of the severance of the lands taken from the properties operated as a unit by the Plantation. The difference between the market value of all of the real properties of the Company held before the takings and forming the integrated enterprise owned and conducted by the Company and the market value of the same property remaining after the takings is the amount the Company suffered in damages by reason of the severance.

ARGUMENT

I.

THE HONOLULU PLANTATION COMPANY HAD SUCH A PROPERTY INTEREST IN THE LAND HELD BY IT UNDER THE DAMON TITLE AS TO ENTITLE IT TO JUST COMPENSATION BY WAY OF SEVERANCE DAMAGES UNDER THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

1. BY VIRTUE OF CERTAIN CORRESPONDENCE BETWEEN THE HONOLULU PLANTATION COMPANY AND THE TRUSTEES OF THE DAMON ESTATE, THE COMPANY HELD A LEASE ON THE SO-CALLED DAMON LANDS.

In its answering brief, the Government concedes (p. 10) that it is the intent of the parties which determines whether a particular instrument or series of instruments is a lease. However, the Government quoting from *Thompson on Real Property* (p. 10 brief) apparently contends that an agreement is a lease only if it "leaves nothing to be done and gives the lessee an immediate right of possession." Further, it is said (p. 10) that if the parties indicate an intention to execute a formal lease at a later date the agreement is not a completed lease. Then, the Government, in reliance upon these general propositions, argues that the correspondence referred to above does not constitute a lease. This theory is based entirely on the meaning of certain language in the correspondence which, it is said, indicates that the parties did not intend a present demise but rather an agreement to lease in the future. In the words contained in the brief, "Thus, there were no words of present demise; on the contrary, both parties spoke of the lease in future terms, an execution of a formal lease was expressly contemplated."

The fallacy in the Government's argument lies in the misapplication of the basic legal principles upon which their theory rests. The quotation from Thompson on Real Property, *supra*, may be a correct statement of the law under certain circumstances but it cannot, as the Government seems to suggest, be applied to all situations. This is clearly demonstrated by the following quotation which appears in Thompson on Real Property (Vol. 3, p. 293, Sec. 1215) in the same paragraph from which the Government's quote is taken.

"However, where there were apt words of present demise, and the tenant went into possession and occupancy thereunder, such instrument has been construed as a present demise rather than as an agreement for a lease, *notwithstanding it contained a covenant for the execution of a more perfect and formal lease.*" (italics added.)

The quotation from the case of *Dan Cohen Realty Company v. National Savings and Trust Company*, 125 F. 2d. 288, 289, 1942, to the effect that "If the contracting parties manifest an intention of executing, subsequently, a formal lease with covenants, the agreement to lease is not a completed lease" (p. 10) is entitled to but little weight. The statement is made as a dictum in a case in which the question was one of venue of the Circuit Court. The only relief asked was that the defendants be compelled to execute the lease, and the holding of the court was that this was an action in personam, and thus not within the jurisdiction of the court of the district in which the property was situated. The question as to whether or not there was a lease was not before the court and was not essential to the determination of the issues in that case. In addition, the above quoted paragraph from Thompson on Real Property indicates that even though the parties manifest an intention to execute

subsequently a formal lease, an agreement, if it contains apt words of present demise, may be construed as a lease.

In the instant case, the correspondence between the parties indicates that the parties intended a present demise. The property was described with sufficient definiteness, the term was designated and the rental specified. After the expiration of the 1927 lease, the Honolulu Plantation Company remained in possession of the premises under what it considered to be a valid lease. On January 1, 1944, the effective date of the new lease, the Company was billed by the lessors at a different and higher rental than was provided for in the 1927 lease. (R. p. 1202.) Subsequently, the Company paid the rentals at the newer and higher rate. The Company, in reliance on the validity of the lease, had made substantial expenditures on the lands (R. p. 1202). Mr. P. E. Spalding, attorney in fact for Honolulu Plantation Company and president of C. Brewer & Company, who was instrumental in the negotiation of the new lease, testified that he believed that the Honolulu Plantation Company had a lease on the Damon lands in question by virtue of the exchange of letters referred to above. (R. p. 1113 et seq.) . This was never refuted by the lessors, although the latter might have been called by the Government to testify concerning their view of the transaction. In view of these facts, it is submitted that it was the intention of the parties that the agreement was to constitute a lease of the premises.

2. IN THE ALTERNATIVE, BY VIRTUE OF CERTAIN CORRESPONDENCE BETWEEN THE HONOLULU PLANTATION COMPANY AND THE TRUSTEES OF THE DAMON ESTATE, AND THE ACTS AND EXPENDITURES OF MONIES BY HONOLULU PLANTATION COMPANY IN RELIANCE THEREON, THE COMPANY HELD AN AGREEMENT TO LEASE ON THE SO-CALLED DAMON LANDS.

It is the position of the appellant that even if it be assumed that the letters of October 18, 1940 and October 21, 1940 (Ex. 9-K, R. p. 1513) do not constitute a lease, they do constitute a contract to lease and that, accordingly, the Honolulu Plantation Company is entitled to recover just compensation for severance damages suffered by the Company by virtue of the taking of its property interest in 595.01 acres of cane land held by it under said contract.

The appellee contends that the correspondence between the appellant's agent and the trustees of the Damon Estate was mere negotiation and not a contract. The Court below found as a fact that there was a contract to lease. (R. p. 497) :

“The known facts are that:

“2. Anticipating the expiration of the then existing lease, on October 18, 1940, the trustees of the Damon Estate offered in writing (Exhibit 9-K) to enter into a new lease with the Company upon terms specified for a period of ten years from January 1, 1944. The offer disclosed that due to anticipated condemnation proceedings not all of the lands involved might be available for lease.

“3. By letter dated October 21, 1940, the Company accepted the Estate's offer. (Exhibit 9-K).

“4. By the terms of this contract both parties had expressly in mind the execution of a formal lease. This

was never done, nor did the Company ever bring suit for specific performance."

Again on page 499 of the record the Court said: "Whether here there is a lease or an executory contract for a lease depends essentially upon the intention of the parties, as gathered from the terms of their October 1940 agreement. If it is a lease, the Company acquired an estate in the lands for 10 years from January 1, 1944. If it is not, it acquired simply an executory right to compel the Damon Trustees to convey to it such an estate, for breach of which contract the Company could recover damages or sue for specific performance. (citing authorities)."

Again, on page 502: "At best, having remained in possession after December 31, 1943, and thereafter having paid the yearly rent called for by the October 1940 contract, the Company had a year to year tenancy, with a right to sue for specific performance."

In its argument the appellee relies on the case of *Elkhorn-Hazard Coal Co. vs. Kentucky River Coal Corporation*, 20 F. 2d. 67 (CCA 6, 1927), stating in its brief (page 11): "The material facts of that case were indistinguishable from those at bar." This contention is unsound. The following material facts were distinguishable from those in the case at bar: (1) The Elkhorn-Hazard case involved a mining lease. This type of lease has long been distinguished by the courts from an ordinary lease of real property. 36 Am. Jur. 309. (2) The Elkhorn-Hazard case was a suit in trespass. The purported lessee had not been in possession of the mine and was being sued in trespass for going into possession without a lease. (3) The question involved in the Elkhorn-Hazard case was whether the mailing of the letter of acceptance constituted an acceptance where it was not received by the offeror. *Elkhorn-Hazard Coal Co. vs. Kentucky River Coal Corporation* (ibid p. 69):

“The mailing of this letter of acceptance is relied on as completing a contract for a lease. It is urged, with much support from the record, that this letter was not in fact mailed. The District Judge has found that it was mailed, and also that it was never received by appellee.”

The court held that although the offer had been mailed it had never been received by the offeree and that consequently the acceptance was not effective.

Moreover, the quotation from the case which the Government sets forth on page 12 of its answering brief, when read in the light of the facts of the case, does not lend any support to the Government's contention. In the Elkhorn-Hazard Coal Company case, Mr. Cockburn, the general manager of the latter company, called on the president of the Kentucky River Coal Corporation concerning a proposed lease. As a result of this interview, the communication quoted in part on pages 11 and 12 of the Government's brief was handed personally to the representative of the Elkhorn-Hazard Company.

In the words of the court:

“At this interview it was represented by Cockburn that he was on his way to attend a meeting of the directors of his company in West Virginia, and that he wished to know upon what terms a lease could be had of the Williams land. The writing was given to him, so that he might lay the same before the board for their consideration. Nothing was said as to the manner in which Mr. Cockburn might transmit the decision of the board. Several days later, Dudley saw him in Lexington, but nothing was said upon the subject. Appellee next heard of the matter in the following December.”

It is clear from the facts in this case that the negotiations, referred to above, were of a preliminary nature only. More

important, since the court found that there had been no acceptance of the offer, there could not under any circumstances be a binding contract.

The argument of the appellee on pages 15 and 16 of the answering brief to the effect that even if there were a contract to lease, it was silent as to so many material terms that it could not be specifically enforced is without merit. The rule is well established that where there is no specification in a contract to execute a lease covering the usual and ordinary covenants and provisions, these will be implied by the courts of equity. *Bennett vs. Moon*, 194 N.W. 802, 1923, and authorities cited therein.

It is a matter of record that not only had the Honolulu Plantation Company been a tenant of the Damon Estate for a long period of time but also it had under lease from the Estate numerous parcels of land, even at the time of the takings involved in these proceedings. The minor details, which were not expressly mentioned in the communications in the instant case, could be readily ascertained and determined by reference to the past conduct of the parties. That the Government is attempting to attach undue importance to this aspect of the case is made obvious by the inconsequential nature of the terms referred to by appellee on page 13 of its brief. If the letter of October 18, 1940 had been intended for purposes of negotiation only, it is not reasonable to believe that the Trustees would have included in the communication the several technical terms therein set forth. Nor is the use of the words "willing to lease" indicative of an intent to enter into negotiations to lease only. Under the circumstances involved here, the use of such a phrase appears to convey the intent on an offer to lease as effectively as any other words which might have been chosen.

The record shows that the Honolulu Plantation Com-

pany continued in possession without objection after the expiration of the 1927 lease. It shows further that the Company, in reliance upon its agreement with the Trustees, made substantial expenditures upon the Damon lands. (R. p. 1202). As has been indicated above, new rentals were billed and paid at the rate set forth in the correspondence (R. p. 1202).

As has been pointed out before Mr. P. E. Spalding testified that he believed that the Honolulu Plantation Company had a lease on the Damon lands in question by virtue of the exchange of letters referred to above. (R. p. 1113 et seq.). In view of these factors, it is submitted to the Court that it was the intention of the parties that the agreement was to constitute at least a contract to lease the premises in question.

Nor is there any merit in the argument of the appellee on pages 14 and 15 of its answering brief where it is contended that there was not an unqualified acceptance of the offer made by the Trustees in their letter of October 18, 1940. It is conceded that the Trustees in the letter of October 18, 1940 did not include fields 95 and 96 in the lands offered to be leased to Honolulu Plantation Company. In the reply of the Honolulu Plantation Company, dated October 21, 1940, the following statement is made: "The terms of your offer are acceptable to Honolulu Plantation Company. We understand that unless fields 95 and 96, makai of Kamehameha Highway, are taken over by some Federal authority before the expiration of the current lease, they will be included in the lands to be leased to Honolulu Plantation Company." Clearly, there was an unconditional acceptance of the offer to lease made by the Trustees. The remark concerning fields 95 and 96 merely indicated a willingness to lease those parcels in the event they were not taken over by the Federal authorities. Thus, there was no qualification or modification of the Trustees' offer.

Even if such remark were to be construed as a request or suggestion that a modification in the terms of the offer be made, it still would not prevent the two letters from constituting an offer and an acceptance.

Frequently, one to whom an offer is made, while making a positive acceptance of the offer, may make a request or suggest that some modification be made. As long as it is clear that the acceptance of the offer is unequivocal, even though the request or modification may or may not be granted, it is clear that a contract is formed. *1 Williston on Contracts*, Para. 79 and cases cited.

Accordingly, in the instant case the statement in the communication of C. Brewer & Company that "We understand that unless fields 95 and 96, makai of Kamehameha Highway, are taken over by some Federal authority before the expiration of the current lease, they will be included in the lands to be leased to Honolulu Plantation Company," (R. p. 1515-1516), has no effect on the validity of the acceptance of the offer made by the Trustees of the Damon Estate. Clearly, it was the intent of the parties that all lands in cane mauka of Kamehameha Highway and makai of the Highway fields 92 to 94, inclusive, were to be included in the lease or agreement to lease.

The appellant directs the Court's attention to a case recently decided by the Court of Claims, *Johnson v. United States*, 79 Fed. Supp. 208, 1948, which involved the claim of a United States District Judge for pay for the remainder of his life in consideration of his resignation.

The court remarked:

"... This Amendment (the fifth) prohibits the taking of private property for public use without just compensation. A contractual right comes within its protection. *Monongahela Navigation Co. vs. United States*, 148 U.S. 312, 13 S.Ct. 622, 37 L. Ed. 463. The right there taken by the National Government was a fran-

chise granted by a State to a company for the erection of locks and dams. It was held it could not be taken without just compensation.

“The right acquired by a judge who resigned after the passage of the Act, sued on is no less a property right than the franchise granted to such company. Both, it would seem, come within the protection of the 5th Amendment. See also *Omnia Commercial Co. vs. United States*, 261 U.S. 502, 43 S.Ct. 437, 67 L. Ed. 773.”

It is submitted that the Johnson case, *supra*, is a further illustration of the principle adopted by the courts that where a claimant has been damaged by the taking of a contract right, he is entitled to compensation. If the right of a judge to compensation for a contract right is compensable under the 5th Amendment, certainly the contract right of a claimant whose claim is related directly to land taken in an eminent domain proceeding is also entitled to compensation. As has been pointed out in appellants' opening brief (p. 12-23), the modern concept of property rights, as enunciated in the cases cited therein, requires the payment of just compensation where contract rights are taken in an eminent domain proceeding. At the time of the takings in the present case, the Honolulu Plantation Company was in possession of the premises under at least a valid contract to lease. The Company was paying rentals in accordance with the terms of the agreement. It had made substantial expenditures on its plant as a whole and on the Damon lands in particular in reliance on the validity of the lease. The takings by the Government in this proceeding results in the expropriation of that contract to lease. Under the authorities referred to on Pages 13-23 of appellants' brief, the Honolulu Plantation Company as the owner of a contract right directly related to the lands taken is entitled to compensation therefor.

II.

APPELLANT IS ENTITLED TO AN AWARD OF \$595,010 AS SEVERANCE DAMAGES FOR THE TAKING OF ITS PROPERTY INTEREST IN 595.01 ACRES OF CANE LAND HELD BY IT UNDER THOSE CERTAIN AGREEMENTS EXECUTED BY AND BETWEEN THE TRUSTEES OF THE DAMON ESTATE AND SAID COMPANY.

On page 17 of its answering brief, the appellee argues that since the trial court rejected the uniform figure of \$1,000 per acre taken advanced by appellant as to the 595.01 acres held under the Damon title, appellant is not entitled to relief because it failed to properly prove any other measure of damages for the taking of the said 595.01 acres.

The answer to this contention is found in the testimony of a number of the Company's witnesses, the summary of which testimony is set forth on pages 32-36, inclusive, of appellant's opening brief. The evidence offered by the Company's witnesses showed that the severance damages amounted to \$1,000 per acre for each acre of cane land taken for the entire 1087.59 acres taken in these proceedings. All of the Company's witnesses testified that in arriving at the figure of \$1,000 per acre, they considered all of the leases of the Company, including the lease on the Damon lands.

The District Court in its decision awarded severance damages to the Honolulu Plantation Company upon the basis of \$1,000 per acre for 440.175 acres, or a total of \$440,175. The Court denied severance damages in connection with the taking of the 595.01 acres of land held under the Damon title on the theory that the Company did not have an estate or interest in those lands which would entitle it to compensation in these proceedings.

In view of the fact that the Government did not present any evidence on the issue of severance damages, the testimony of the Company's witnesses that the value of the remaining physical property depreciated at the rate of \$1,000 per acre for each acre of cane land taken in these proceedings should be accepted by this Court as the proper measure of severance damages in this proceeding.

CONCLUSION

Accordingly, it is submitted to the Court that the Honolulu Plantation Company by virtue of its estate and interest in the Damon lands is entitled on this cross-appeal to judgment in the amount of \$595,010, in addition to the amount of \$494,748 awarded by the lower court.

Dated at Honolulu, T. H., this ^{16th} day of May, 1949.

C. NILS TAVARES

VERNON O. BORTZ

Alexander & Baldwin Building
Honolulu, T. H.

Attorneys for

Honolulu Plantation Company
Appellant.

Of Counsel:

PRATT, TAVARES & CASSIDY



